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1879
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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 162.

GEORGE E. KETCHUM, JAMES SELIGMAN, THOMAS W. PRICE, THE ATLANTIC AND PACIFIC RAILROAD COMPANY, ET AL., APPELLANTS,

vs.

THE COUNTY OF SAINT LOUIS, INTERVENOR.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED AUGUST 7, 1877.

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1 The United States of America to the county of St. Louis, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October next, pursuant to an appeal allowed by the circuit court of the United States for the eastern district of Missouri, wherein The Atlantic & Pacific Railroad Company, George E. Ketchum, Uriel Murdock, Luther C. Clark, Edwin D. Morgan, Jesse Seligman, James Baker, Thomas W. Pierce, James Seligman, James D. Fish, and Henry F. Vail, are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel Treat, judge of the circuit court of the United States for the eastern district of Missouri, this 4th day of May, in the year of our Lord one thousand eight hundred and seventy-seven.

SAMUEL TREAT,
Judge United States Circuit Court Eastern District of Missouri.

Rec'd copy of above citation this 4th day of May, 1877.

FRANK J. BOURMAN,
Attorney for St. Louis Co., Intrespla.

2 (Indorsed:) 703. United States court, district of Missouri. Atlantic & Pacific R. R. Co. et al., appellees, vs. St. Louis County, appellee. Citation. Filed May 4, 1877. M. M. Price, clerk.

3 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

Be it remembered that heretofore, to wit, on the 11th day of November, A. D. 1875, in the circuit court of the United States in and for said district, there appears of record the following, to wit:

GEORGE E. KETCHUM, COMPLAINANT,
vs.
PACIFIC RAILROAD ET AL., DEFENDANTS.

Now comes the complainant, by his solicitors, Messrs. Sharp & Broadhead, and files his bill of complaint herein against the said defendants, and on motion of said solicitors it is ordered that subpœnas in chancery be issued against the said defendants, returnable to rules the first Monday, the 3rd day of January, 1876.

The said bill of complaint, so filed as aforesaid, is in words and figures following, to wit:

In the circuit court of the United States for the eastern district of Missouri.

4 To the honorable the judges of the circuit court of the United States for the eastern district of Missouri, in the eighth circuit, sitting in equity:

Humbly complaining, shows unto your honors your orator, George E. Ketchum, a citizen of the State of New York, who brings this bill of

complaint against the Pacific Railroad, a corporation created under and by virtue of the laws of the State of Missouri, and against the Atlantic and Pacific Railroad Company, a corporation created and organized under and by virtue of an act of Congress of the United States, approved July 27, 1866, and at the several times hereinafter mentioned engaged in operating and maintaining a railroad in the State of Missouri aforesaid, and against James Baker, Rufus J. Lackland, and Dwight Durkee, citizens of the State of Missouri; and Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, James Punnett, and Luther C. Clark, citizens of the State of New York.

And thereupon your orator complains and alleges that the said Atlantic and Pacific Railroad Company was and is a corporation created in manner aforesaid, and by the aforesaid act of Congress authorized and empowered to sue and be sued, plead and be impleaded, defend and be defended in all courts of law and equity within the United States.

5 Your orator further complains and alleges:

First. That the said Pacific Railroad, defendant herein, made and delivered to the defendants Uriel A. Murdock, James Punnett, and Luther C. Clark a mortgage or deed of trust dated July 15th, 1868, by which said Pacific Railroad conveyed and mortgaged to the said Murdock, Punnett, and Clark all and singular of the entire line of the Pacific Railroad, two hundred and eighty-three miles in length, extending from the depot at Fourteenth street, in the city of St. Louis, and passing through the counties of St. Louis, Franklin, Gasconade, Osage, Cole, Moniteau, Cooper, Pettis, Johnson, Cass, and Jackson, in the State of Missouri, and ending at the western boundary of said State of Missouri, at Kansas City, with its appurtenances, including the depots, stations, machine shops, rolling stock, machinery, rights, interests, and franchises of the said railroad as trustees, and in trust to secure the payment of the series of seven thousand bonds mentioned in said mortgage, severally dated the first day of August, 1868, for the sum of one thousand dollars each, payable twenty years after date to bearer in gold coin of the United States of America, at the Bank of America, in the city of New York, and interest thereon at the rate of six per cent.

6 per annum, payable semi-annually in gold coin upon the presentation of coupons thereunto annexed; and which said mortgage contained a clause to the effect that if the said Pacific Railroad should fail to pay the interest on any of the said bonds secured thereby, for ninety days after the same became due and payable, and demand therefor made, or if the principal sum of any of said bonds, when and as the same became due and payable, should not be paid for the period of ninety days after demand made therefor, said mortgagees or trustees were authorized and required upon the written request of the holder of any bond, the principal or interest of which should be in arrear or unpaid, to sell the said railroad and property, interests, rights, and franchises thereby mortgaged, at public auction, at the court-house in the city of St. Louis, first giving ninety days' notice thereof, and of the time, place, and terms of sale, by notice specified in said mortgage, and on such sale to execute and deliver conveyances to transfer and convey said property, and all the interest of said mortgagors therein, to the purchaser or purchasers thereof, who were thereby authorized to enter upon and take possession of the same; and in such case said trustees were directed to apply the proceeds of such sale pro rata among

7 the holders of all bonds secured by said mortgage.

Your orator further shows unto your honors that the whole

amount of seven millions of dollars of bonds, mentioned in and secured by said mortgage, were executed, issued, and negotiated by said company, and are now outstanding, and that the interest has been duly and regularly paid upon said bonds, and that no interest is due thereon, nor will any mature until February 1st, 1876, and that said mortgage is a first lien upon the property thereby mortgaged.

Second. Your orator further shows unto your honors that said Pacific Railroad made and delivered to the defendants Edwin D. Morgan and Joseph Seligman a mortgage or deed of trust dated July 1st, 1871, by which said Pacific Railroad conveyed and mortgaged to the said Morgan and Seligman the same property mentioned and described in the preceding mortgage to Murdock, Punnett, and Clark, and subject to the lien of said last mentioned mortgage, as trustees, and in trust to secure the payment of an issue of three thousand bonds mentioned in the said mortgage, severally dated July 1st, 1871, for the sum of one thousand
dollars each, payable twenty years after date, in lawful money of
8 the United States, to the holders of said bonds, at the National Bank of Commerce in the city of New York, and interest thereon at the rate of seven per cent. per annum, payable semi-annually, in like lawful money, on the presentation of coupons thereunto annexed; and which said mortgage contained a clause similar in all respects to that mentioned in the preceding mortgage, authorizing the trustees upon the written request of the holders of any ten or more of the bonds secured thereby, in case of default for ninety days in the payment of principal or interest after demand, or in case of failure to pay said trustees an annual sum of fifty thousand dollars, thereby agreed to be paid to reduce said mortgage, to sell and convey the premises therein mentioned for the benefit of all the bonds secured thereby, without preference or priority.

That the whole amount of said bonds mentioned in said mortgage were executed, issued, and negotiated by said company; that under a clause in the said mortgage providing for a sinking fund, one hundred
and ninety-six thousand dollars of the bonds secured thereby
9 have been redeemed and cancelled; and that the residue of the entire issue of said bonds secured by said mortgage, amounting to two millions eight hundred and four thousand dollars, are now outstanding and unpaid; and that the interest has been duly and regularly paid upon all the bonds outstanding, and that no interest will mature thereon until January 1st, 1876, and that said mortgage is a second lien upon the said property.

Third. That the said Pacific Railroad made and delivered to the defendants Rufus J. Lackland and Dwight Durkee a mortgage or deed of trust, dated April 19th, 1872, by which said Pacific Railroad conveyed and mortgaged to the said Lackland and Durkee certain real estate in the city of St. Louis, State of Missouri, in said mortgage described as follows: Four blocks of ground in the city of St. Louis, being city blocks numbered four hundred and eighteen, four hundred and twenty-three, four hundred and twenty-eight, and four hundred and thirty-three, bounded east by Seventh street, south by Cerre street, west by Eleventh street, and north by Poplar street.

Also block number two hundred and thirteen in the city of St.
10 Louis, bounded east by Twelfth street, south by Austin street, west by Fourteenth street, and north by Randolph street; saving and excepting therefrom lots 26, 29, 33, and 34, the north one-half of lot number 36, and part of lot number 25, embracing the southwest cor-

ner of said block, sixty-six feet eight inches on Fourteenth street by one hundred feet on Austin street.

Also, the following-described real estate in the city block number four hundred and thirty-eight, viz: Beginning at the northwest corner of Eleventh and Cerré streets, in the city of St. Louis, the southeast corner of said block; thence west along the north side of Cerré street one hundred and fifty-two feet and six inches, more or less, to an alley; thence north one hundred feet; thence east, parallel to Cerré street, one hundred and fifty-two feet and six inches to Eleventh street; thence southwardly on the line of Eleventh street to the place of beginning.

Also, the following, viz: Commencing on the southwest corner of city block number four hundred and thirty-eight, the northeast corner of Twelfth and Cerré streets; thence north one hundred and four
11 feet and six inches; thence east one hundred and fifty-two feet and six inches to an alley; thence south one hundred and four feet six inches to Cerré street; thence west one hundred and fifty-two feet six inches to Twelfth street, the place of beginning.

Also, the following-described tract or parcel of land, viz: Commencing at the northwest corner of city block number four hundred and thirty-nine, the southeast corner of Twelfth and Cerré streets; thence south one hundred and twenty-six feet, more or less, to the south line of property of the Pacific Railroad; thence eastwardly along said south line to the northeast corner of said block 439; thence along the south line of Cerré street to the place of beginning, as trustees, and in trust to secure the payment of an issue of bonds, amounting in the aggregate to eight hundred thousand dollars, each dated May 1st, 1872, payable twenty years after date, in lawful money of the United States, to bearer, at the National Bank of Commerce, in the city of New York, with interest thereon at the rate of eight per cent. per annum, payable semi-annually, in like lawful money, on the presentation of certain coupons
12 annexed to said bonds; of which said bonds, six hundred were for the sum of one thousand dollars each, and four hundred for the sum of five hundred dollars each; and which mortgage contained a clause similar to that contained in the preceding mortgage, authorizing the trustees, upon the written request of the holders of any ten or more of the bonds secured thereby, in case of default of ninety days in the payment of the principal or interest, after demand, to sell and convey the premises therein mentioned, for the benefit of all the bonds secured thereby, without preference or priority; and that the whole amount of said bonds were executed, issued and negotiated by said company, and are now outstanding, and that said mortgage is a first lien on the real estate therein mentioned.

Fourth. Your orator further shows unto your honors that, subsequent to the execution and delivery of the aforementioned mortgages, the said Pacific Railroad constructed a branch railroad connecting with and intersecting its main line aforesaid at or near Kirkwood, about
13 thirteen miles west from the city of St. Louis, and extending from the point of such intersection to the Mississippi River, at Carondelet, now known as South St. Louis, in the State of Missouri aforesaid; and also constructed, in connection with said branch railroad, side tracks running to and connecting with furnaces built on the line of the railroad at Carondelet aforesaid, and also erected on said branch road depots, engine-houses, and water stations, and also a depot at Carondelet aforesaid; and also purchased and acquired the title to various parcels of real estate on the line of said branch railroad at or near Carondelet aforesaid for the erection of depots, stations, machine shops, and

other purposes connected with the operation of said branch railroad; and thereupon said Pacific Railroad made and delivered to the defendants Jesse Seligman and James Baker a mortgage or deed of trust dated October 1st, 1873, by which said Pacific Railroad conveyed and mortgaged to said Seligman and Baker all and singular the branch railroad constructed and operated as aforesaid, and extending from a point on the main line of the railroad of the parties of the first part, at or near Kirkwood, thence to the termination of said railroad at the Mis-
14 sissippi River at Carondelet or South St. Louis aforesaid, with its appurtenances, including the depots, stations, machine shops, superstructures, and erections on the line of said branch railroad or at Carondelet aforesaid, together with all the side-tracks and switches connected with said branch railroad, and also all the lands acquired or appropriated, or which may be acquired or appropriated, for depots, engine-houses, car-houses, station-houses, warehouses, machine shops, or other superstructures and erections on the line of said branch railroad, or at Carondelet aforesaid, excluding, however, from the operation or lien of this mortgage the depot at Kirkwood, or any building erected or which may be erected at Kirkwood aforesaid, for or connected with the operation of the main line of said railroad as aforesaid, as trustees, and in trust to secure the payment of an issue of five hundred bonds, each for the sum of one thousand dollars, dated October 1st, 1873, payable twenty years after date, to bearer, in gold coin of the United States, at the National Bank of Commerce in the city of New York, and interest thereon at the rate of six per cent. per annum, in gold coin afore-
15 said, semi-annually, on the first days of April and October, on the presentation of coupons or interest warrants annexed thereto.

That said mortgage contained a clause to the effect that, if the said Pacific Railroad should fail to pay the interest on any of said bonds for six months after demand made therefor, or if the principal sum of any of said bonds, when the same became due and payable, should not be paid for a like period, after like demand, said trustees were authorized and required, upon the written request of the holders of bonds to the amount of one hundred thousand dollars, the principal or interest of which should be in arrear and unpaid, to sell the said property at the court house in St. Louis, first giving ninety days' notice thereof, as in said mortgage mentioned; and on such sale to execute and deliver conveyances thereof, to transfer and convey said property to the purchaser thereof, and to apply the net proceeds to the payment of all the bonds secured by said mortgage pro rata.

That each and all of said bonds mentioned in said mortgage were duly executed, issued, and negotiated by the said Pacific Railroad, and
16 are now outstanding and unpaid; and that the interest thereon has been regularly paid, and that no interest will become due thereon until April 1st, 1876, and that said mortgage is a first lien on the property therein mentioned.

Fifth. That the said Pacific Railroad made and delivered to the defendants Henry F. Vail and James D. Fish a mortgage or deed of trust, dated July 10th, 1875, by which said Pacific Railroad conveyed and mortgaged to the said Vail and Fish all the property, real and personal, rights, interests, and franchises of the said railroad, included in and covered by each of the four mortgages hereinbefore mentioned, as follows, that is to say:

1. The line of the said Pacific Railroad extending from depot at Seventh street, in the city of St. Louis, two hundred and eighty-three miles in length, with its appurtenances, including the real estate, depots, sta-

tions, machine shops, rolling stock, machinery, rights, interests, and franchises of the said railroad, subject to the lien of the two mortgages hereinbefore mentioned, severally executed by said company, one of which was executed to said Murdock, Punnett, and Clark, and
17 the other of which was executed to the said Edwin D. Morgan and Joseph Seligman.

2. All and singular the following-described real estate, in the city of St. Louis, State of Missouri, viz:

Four blocks of ground in the city of St. Louis, being city blocks numbered four hundred and eighteen, four hundred and twenty-three, four hundred and twenty-eight, and four hundred and thirty-three, bounded east by Seventh street, south by Cerré street, west by Eleventh street, and north by Poplar street.

Also block number two hundred and thirteen, of the city of St. Louis, bounded east by Twelfth street, south by Austin street, west by Fourteenth street, and north by Randolph street, saving and excepting therefrom lots 26, 29, 33, and 34, the north one-half of lot number 36, and part of lot number 25, embracing the southwest corner of said block, sixty six feet eight inches on Fourteenth street by one hundred feet on Austin street.

Also the following described real estate in city block, number four hundred and thirty-eight, viz: Beginning at the northwest corner of Eleventh and Cerré streets, in the city of St. Louis, the southeast corner of said block; thence west along the north side of Cerré street,
18 one hundred and fifty-two feet and six inches, more or less, to an alley; thence north one hundred feet; thence east, parallel to Cerré street, one hundred and fifty-two feet and six inches, to Eleventh street; thence southwardly, on the line of Eleventh street, to the place of beginning.

Also the following, viz: Commencing at the southwest corner of city block number four hundred and thirty-eight, the northeast corner of Twelfth and Cerré streets; thence north one hundred and four feet and six inches; thence east one hundred and fifty-two feet and six inches, to an alley; thence south one hundred and four feet six inches to Cerré street; thence west one hundred and fifty-two feet six inches to Twelfth street, the place of beginning.

Also the following described tract or parcel of land, viz: Commencing at the northwest corner of city block number four hundred and thirty-nine, the southeast corner of Twelfth and Cerré streets; thence south one hundred and seventy-six feet, more or less, to the south line of property of the Pacific Railroad; thence eastwardly, along said south line, to the northeast corner of said block 439; thence along the
19 south line of Cerre street to the place of beginning; being the same property mentioned and described in the aforesaid mortgage executed to Lackland and Durkee, and said premises being so conveyed subject to the lien of said last-mentioned mortgage.

3. All and singular the branch railroad of the said Pacific Railroad, constructed and operated, and extending from a point on the main line at or near Kirkwood, thence to the termination of the said railroad at the Mississippi River, at Carondelet, or South St. Louis, with its appurtenances, including the depots, stations, machine shops, superstructures, and erections on the line of said branch railroad, or at Carondelet aforesaid, together with all the side tracks and switches connected with said branch railroad, and also all the lands acquired or appropriated, or that may be acquired or appropriated, for depots, engine-houses, car-houses, station-houses, warehouses, machine-shops, or other superstructures

and erections on the line of said branch railroad, or at Carondelet aforesaid; which said last-mentioned premises and property were so mortgaged, subject to the lien of the aforesaid mortgage to Jesse Seligman and James Baker.

That said several parcels of property, franchises, and appur-
20 tenances were so conveyed to Henry F. Vail and James D. Fish, as trustees, and in trust to secure the payment of an issue of four thousand bonds, therein and herein termed "Third Mortgage Bonds," of one thousand dollars each, dated July 10th, 1875, payable twenty years after date, to bearer, in lawful money of the United States, at the office of the Atlantic & Pacific Railroad Company, in New York, with interest at seven per cent. per annum from May 1st, 1875, in like lawful money, semi annually on the first of November and May in each year, on the presentation of coupons annexed to said bonds; and that the payment of the principal and interest of each of said bonds was guaranteed by the Atlantic & Pacific Railroad Company.

That said mortgage contained a clause to the effect that if the said Pacific Railroad should fail to pay the interest on any of said bonds thereby secured, for six months after the same became due and payable, and demand made therefor, or if the principal sum of any of said bonds, when payable, should not be paid for six months after demand, said trustees were authorized and required, on the written request of holders of bonds to the amount of five hundred thousand dollars, the principal or interest of which should then be in arrear or unpaid, to sell
21 the said railroad and branch railroad, and all the property by said mortgage conveyed, at public auction, in the city of St. Louis, giving notice thereof as specified in said mortgage, and to execute and deliver conveyances to transfer and convey said property to the purchaser or purchasers, who might immediately enter upon and take possession of the same, and to apply the net proceeds of said sale to the payment of all the bonds secured by said mortgage, and then unpaid, pro rata.

That said last-mentioned mortgage, dated July 10th, 1875, recited the fact, and your orator, on information and belief, avers the fact to be, that said Pacific Railroad had issued its bonds, amounting in the aggregate to fifteen hundred thousand dollars, and designated as "income bonds," each of which bonds was dated September 2d, 1872; and of which one thousand were for one thousand dollars each, and eight hundred were for five hundred dollars each, and one thousand for one hundred dollars each, payable in lawful money of the United States, on the first of September, 1892, with interest at seven per cent. per annum, in like lawful currency, on the first of March and September
22 in each year; and that said company had also made a further issue of bonds, amounting in the aggregate to the principal sum of two millions dollars, and designated as "improvement bonds," consisting of two thousand bonds of one thousand dollars each, and dated December 10th, 1874, payable in lawful money of the United States, on the first of November, 1889, with interest at seven per cent. per annum, in like lawful money, payable on the first of May and November in each year, on the presentation of coupons annexed to said bonds.

That the interest and principal of said "income" and "improvement" bonds were chargeable against and payable out of the earnings of the said railroad prior to any dividend on its capital stock, but were not secured by any mortgage or lien upon any of the property hereinbefore mentioned.

That said mortgage also recited and declared that a portion of said

third-mortgage bonds should be used in retiring and cancelling the issue of income bonds and improvement bonds last above mentioned, so far as the same could be done; and that the residue of said bonds should be issued by said company for the purpose of obtaining additional
23 sums of money for the future permanent improvement of its road.

Your orator further shows unto your honors that the entire amount of third-mortgage bonds secured by said mortgage were issued by said company, and that a sufficient number of said bonds to retire the "income" and "improvement" bonds were placed in the hands of the trustees in said mortgage mentioned, to wit, said Vail and Fish, for the purpose of being exchanged for such "income" and "improvement" bonds; and upon information and belief your orator charges that about two millions dollars of said bonds have been exchanged for "income" and "improvement" bonds, as above mentioned, and that in addition upwards of three hundred thousand dollars of said bonds have been negotiated by said company, and that all of said bonds secured by said third mortgage are now outstanding and unpaid, and that none of the interest which became due on said bonds or any of them, on the first of November, 1875, has been paid, but that the whole amount thereof remains due and unpaid; and that your orator is the holder of many of said third-mortgage bonds
24 secured by the aforesaid third mortgage, and that the interest which became due on said bonds was duly demanded on the first day of November, 1875, according to the terms of said mortgage, and the coupons representing said interest were presented for payment at the place where the same, by the terms thereof, are payable, on the first day of November, 1875, and payment demanded and refused.

Your orator further shows that each and every of the mortgages hereinbefore mentioned was duly recorded in the proper offices, and that no proceedings at law have been had or taken on behalf of any holder of any of the bonds secured by any of the aforesaid mortgages for the recovery of the principal or interest of any of the said bonds herein mentioned or secured by said mortgage, nor any suit or action commenced in regard to or upon said mortgages, or either of them.

Sixth. Your orator further shows unto your honors that the Pacific Railroad, defendant herein, is a corporation created by and under the laws of Missouri, and that on the 29th of June, 1872, the said Pacific Railroad owned and operated a railroad extending from St.
25 Louis aforesaid to Kansas City on the western boundary line of the State of Missouri, and which said road extended through Franklin, and also operated several lines of railway connected with its main line, and which had been theretofore leased to it by various railroad corporations owning such lines, and which last-mentioned lines, so leased and then operated by said Pacific Railroad (of Missouri), extended to and from the following points, that is to say, from Tipton to Booneville, both in Missouri, a distance of twenty-five miles; from Sedalia to Lexington, both in Missouri, a distance of fifty five miles; from Kansas City, aforesaid, to Leavenworth, Kansas, a distance or twenty-five miles; and from Leavenworth, aforesaid, to Atchison, Kansas, a distance of twenty-one miles; and your orator charges that the said leased lines and the property appurtenant thereto are bound by the lien of the aforesaid mortgage to James Baker and Henry F. Vail.

That on said last-mentioned day the said Atlantic & Pacific Railroad Company was engaged in the operation of a continuous line of
26 railway from Franklin, in the State of Missouri, distant about

thirty-seven miles west from St. Louis to the western boundary of said State, and thence to Vinita, distant therefrom thirty-five miles; and that said corporation had no mode of reaching St. Louis aforesaid except over the road of the Pacific Railroad, defendant herein, and that it had no passenger depots, or other adequate depots or facilities for the transaction of its business at St. Louis aforesaid.

That on the day last aforesaid, to wit, the twenty-ninth of June, 1872, the said Pacific Railroad (of Missouri) leased to the said Atlantic and Pacific Railroad Company, upon the terms and conditions in said lease mentioned, the entire line of railroad then operated by it, including the several lines of railway so leased to it, as last aforesaid; and thereupon the said Atlantic and Pacific Railroad Company took possession of said lines so leased and managed and operated the same; and that subsequently to said lease an additional line of road, extending from Kirkwood, on the line of the said Pacific Railroad, to Carondelet, on the Mississippi River, a distance of fifteen and one-half miles, being
27 the "Carondelet Branch," hereinbefore mentioned, was built, and has been managed and operated by the said Atlantic and Pacific Railroad Company; and that additions and improvements have been from time to time made since said lease by the erection of depots, freight houses, car-houses, and other structures, at and in the immediate vicinity of St. Louis aforesaid, and elsewhere, which were deemed necessary for carrying on the business of said roads, and large amounts of money expended therein and thereabout, and also in the purchase of locomotive engines and cars, and rolling stock of various descriptions, used in operating said road; and since said lease as aforesaid, the entire lines of road extending from St. Louis through Franklin aforesaid to the terminal points of the lines of road of said Atlantic and Pacific Railroad Company and of said Pacific Railroad, respectively, as above stated, including the lines of road so leased to said Pacific Railroad (of Missouri) and said Carondelet Branch, have been operated as one road; and that all the property hereinbefore mentioned is in the possession of the Atlantic and Pacific Railroad Company; and that, as your ora-
28 tor is advised and believes, it is necessary and essential for the interests of all parties interested in said several lines of road, and of the mortgage creditors of said two companies respectively, that said road should be continued to be operated and managed as one road, proper regard being had to the rights of creditors having liens by mortgage upon portions of the railroad premises and property originally belonging to the said Pacific Railroad (of Missouri).

Seventh. Your orator further shows unto your honors that, by the terms of the lease to the said Atlantic and Pacific Railroad Company, the latter company agreed to and became bound to pay the interest on the mortgages theretofore issued and executed by the said Pacific Railroad, including the mortgages herein firstly, secondly, and thirdly mentioned and described, and also all moneys required to be paid by the said Pacific Railroad under the leases of the several leased lines hereinbefore mentioned, and also certain dividends upon the stock of the said Pacific Railroad, as specified in said lease; and that, by the terms
29 of said lease, a dividend to the shareholders of the said Pacific Railroad of one and one-half per cent. upon the capital stock of the said company became payable under said lease on the 20th day of October, 1875; and that default was made in the payment thereof, and the same still remains due and unpaid.

That in pursuance of the said lease, obligations in various forms for the payment of money were from time to time issued by the Atlantic

& Pacific Railroad Company in the name of the said Pacific Railroad, defendant herein, and for the payment of which said last-named company is liable; and that said last-named company is also liable to pay the principal and interest of the third-mortgage bonds, dated July 10, 1875, to Baker & Vail.

That the said Atlantic & Pacific Railroad Company has made default in the payment of interest on its bonds, secured by mortgages executed upon the property originally belonging to it before the making of said lease; and became embarrassed by floating debts to a very large amount, and has been unable to pay the dividends above mentioned, and the interest due November 1st, 1875, upon the third-mortgage bonds herein mentioned; and that creditors of said Pacific Railroad, and of
30 the said Atlantic & Pacific Railroad Company, have threatened to sue said corporations, and each of them, and have sued said last-named corporation.

That there is a large sum of money due for taxes remaining unpaid, for which each of the said railroad companies is responsible, and that the said Pacific railroad is without sufficient means to pay and discharge its valid obligations in full as they become due; that its commercial paper has been protested; and that it is liable to actions, suits and proceedings, on account thereof; and that the said Atlantic & Pacific Railroad Company is without sufficient means to pay and discharge its valid obligations in full as they become due; that its commercial paper has been protested, and that it is liable to actions, suits and proceedings on account thereof; and that there is great danger that the property covered by the third mortgage hereinbefore mentioned may be attached or levied upon under execution or other legal process.

That the interest upon the first and second mortgages mentioned herein has been regularly paid as the same became due, and that
31 the premises covered by said mortgages are an abundant and ample security for the payment of the bonds secured by those two mortgages as they mature; and that the net earnings and income of the railroad therein mentioned have been, are, and will be, ample and sufficient to provide for, pay, and keep down the interest to become due under all the mortgages hereinbefore mentioned, which are prior liens to the third mortgage; but that the said mortgaged premises are an insufficient and inadequate security for the payment of the amount due, and to become due, under the mortgage last aforesaid, and that the rights and interests of all parties interested in the said last-mentioned mortgage, and the rights and interests of creditors of said Pacific Railroad not secured by mortgage, require that a receiver should be appointed as hereinafter prayed for.

Your orator further, on information and belief, alleges that default having been made, as hereinbefore stated, by the Atlantic & Pacific Railroad Company, in the payment of interest upon one of the mortgages executed and issued by that company to secure the pay-
32 ment of an issue of six millions dollars of bonds, an action was instituted on behalf of the holders of such bonds to foreclose such mortgage, and for the appointment of a receiver of the property and effects of the said company, including the property leased to it by the Pacific Railroad, defendant herein, and that such action is still pending and undetermined.

Eighth. Your orator further shows unto your honors, that an application has been made by your orator, on behalf of himself and other holders of bonds, secured by said mortgage, to the defendants, Henry F. Vail and James D. Fish, to take proceedings to foreclose the afore-

said mortgage, and to protect the interests of your orator and such other holders; but that no such proceedings have been taken, and, as your orator is informed and believes, some doubt is expressed whether, under such mortgage, they have the right to institute such proceedings, or any proceedings thereunder, by reason of the nonpayment of the interest due November 1st, 1875, and for such reason prefer not to take such proceedings; and your orator being apprehensive that his interests, and the interests of the other holders of like bonds, may be seriously
33 affected by delay in the institution of proceedings to foreclose said mortgage, and to obtain possession of said property, has brought this action on his own behalf and on behalf of all others similarly situated, and holding like bonds secured by said third mortgage, and has made said Vail and Fish parties defendants herein. In consideration whereof, and forasmuch as your orator is remediless in the premises at and by the strict rules of the common law, and is only relievable in a court of equity, where matters of this kind are properly cognizable and relievable:

Your orator, therefore, prays that the said mortgage, dated July 10th, 1875, executed by said Pacific Railroad to the defendants Vail and Fish, may be foreclosed, and that the premises and property covered thereby may be sold under a decree of this honorable court; that the premises and property covered thereby, which are by the terms thereof subject to the two mortgages, one dated July 15th, 1868, to the defendants Murdock, Punnelt and Clark, and the other dated July 1st, 1871, to the defendants Edwin D. Morgan and Joseph Seligman, may be sold separately, subject to the lien of said two mortgages; and that the
34 real estate embraced in said mortgage of July 10th, 1875, which is thereby subject to the mortgage dated April 19th, 1872, to the defendants Lackland and Durkee, may be sold separately, subject to the lien of said last-mentioned mortgage; and the branch railroad and other property embraced in said mortgage of July 10th, 1875, which by the terms thereof are subject to the mortgage dated October 1st, 1873, to the defendants Jesse Seligman and James Baker, may be sold separately, subject to the lien of said last-mentioned mortgage; or, if the court should determined that all the property embraced in said mortgage of July 10th, 1875, should be sold in one parcel, subject to the liens of the mortgages thereon existing prior to said July 10th, 1875, the same may be so sold; and that if the court should determine that all the property covered by said several mortgages be sold, and the proceeds applied to the extinguishment of the several prior mortgages thereon, then that the net proceeds of the several parcels of property covered by said several prior mortgages, (the liens of which said several prior mortgages upon the several parcels of property embraced therein are hereby recognized) may be applied to the payment of said mort-
35 gages respectively, and that, subject to the payment of such prior liens, the net proceeds of the sale of the mortgaged premises under the mortgage of July 10th, 1875, may be applied to the payment of all bonds secured by said mortgage last mentioned at that time outstanding and unpaid, and of the interest thereon, without discrimination or preference, and rateably; and that the said several defendants in this action, and all persons claiming under them, or either of them, may be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said mortgaged premises and every part and parcel thereof.

Your orator further prays that, if necessary, an account may be taken of the bonds secured by the said mortgages, and of the amount due on

said bonds for principal and interest, or either, and that a receiver be appointed, according to the course and practice of this court, with the usual powers of receivers in like cases, of all the property, equitable interests, things in action, effects, moneys, receipts and earnings, rights, privileges, franchises, and immunities of the said Pacific Railroad, including the lines of railway and other property transferred to and
36 possessed by the said Atlantic and Pacific Company, under the aforesaid lease from the Pacific Railroad (of Missouri), or operated by said Atlantic & Pacific Railroad Company, as hereinbefore stated, and all rolling-stock and other property appurtenant to said lines of railway; and that a writ of injunction be issued out of and under the seal of this honorable court, or by one of your honors, according to the form of the statute in such case made and provided, enjoining and restraining the said defendants herein, and each and every one of them, except the receiver appointed by this court, from interfering with, transferring, selling or disposing of any of the property aforesaid, or from taking possession of, levying upon, or attempting to sell, either by judicial process or otherwise, any portion of the property aforesaid, or of which said receiver may be appointed; and that your orator may have such further or other relief in the premises as to this honorable court shall seem meet.

And may it please your honors to grant unto your orator a subpœna of the United States of America, issuing out of and under the seal of this honorable court, directed to the defendants, the Pacific Rail-
37 road, the Atlantic & Pacific Railroad Company, James Baker, Rufus J. Lackland, Dwight Durkee, Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, James Punnelt, and Luther C. Clark, respectively, therein and thereby commanding them, on a day certain therein to be named, and under a certain penalty, to be and appear before this honorable court, then and there to answer all and singular the premises, and to stand to, perform and abide by the said order, direction, and decree as may be made against them in the premises, as shall seem meet and agreeable to equity and good conscience.

And as to the said several parties who are properly defendants to this bill of complaint, and who may be out of the jurisdiction of this court, your orator prays that process may be issued to make them parties if they should come within such jurisdiction; or that if they should not come within such jurisdiction, such proceedings may be had in regard to such defendants, by publication or ortherwise, to conclude them in this behalf, as may be authorized by and be according to the form of the statutes in such case made and provided.

And your orator, as in duty bound, will ever pray, &c.

GEORGE E. KETCHAM.

SHARP & BROADHEAD,
Of Counsel for Comp'nt.

38 UNITED STATES OF AMERICA,
Southern District of New York, ss:

George E. Ketcham, being duly sworn, says that he is the plaintiff in the foregoing bill named, and has read the same, and knows the contents thereof, and that the matters and facts therein stated are true.

GEORGE E. KETCHAM.

Sworn and subscribed before me by the said George E. Ketcham on this 3rd day of November, 1875.

GEO. F. BETTS,
U. S. Commissioner Southern District of New York.

And thereupon a subpœna in chancery was issued and duly served on all the defendants residing in the State of Missouri.

And afterwards, to wit, on the 8th day of January, 1876, the following proceedings were had in said cause:

GEORGE E. KETCHUM, COMPLAINANT,
vs.
PACIFIC RAILROAD ET AL., DEFENDANTS.

This day comes the complainant, by James O. Broadhead, esquire, his solicitor, and shows to the court that Jesse Seligman, Henry
39 F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, James Punnelt, and Luther C. Clark, are not inhabitants of, nor found within, this district, and that they have not voluntarily entered their appearance herein; and on motion of said solicitor it is ordered that said absent defendants be, and they are hereby, directed to appear at the clerk's office of this court on or before the first Monday of February next, and plead, answer or demur to the complainant's bill herein.

It is further ordered that a certified copy of this order be served on said absent defendants in the manner required by the rules of this court for the service of other process.

And afterwards, on the 7th day of February, 1876, the defendant, The Pacific Railroad, filed the following answer to the bill of complaint herein, to wit:

In the circuit court of the United States for the eastern district of Missouri.

GEORGE E. KETCHUM
vs.
THE PACIFIC RAILROAD, THE ATLANTIC & PACIFIC Railroad Company, James Barker, Rufus J. Lackland, et al. } In equity.

40 And now on this day comes the Pacific Railroad, and for a separate answer to the bill of complaint in this case, says true it is the said Pacific Railroad is a corporation created under and by virtue of the laws of the State of Missouri, and that the said Atlantic & Pacific Railroad Company is a corporation created under and by virtue of the act of Congress in said bill mentioned.

It also states that it is true that it made and delivered to the defendants, Uriel A. Murdock, James Punnelt, and Luther C. Clark, the mortgage or deed of trust mentioned in said bill, dated July 15th, 1858, to secure bonds as therein described to the amount of seven million dollars, and that the said mortgage contained the provisions and conditions therein mentioned, and the interest on the *interest on the* bonds therein mentioned has been duly paid.

It *is* also admits that it made and delivered, as in said bill stated, to Edwin D. Morgan and Joseph Seligman the mortgage or deed of trust therein mentioned to secure the bonds therein mentioned, and that said mortgage contained the provisions and conditions therein mentioned; that the whole amount was issued and sold, and that there are now outstanding the amount thereof in said bill mentioned, and that
41 the interest thereon has been duly paid.

It also admits that it is true that it made the mortgage therein

mentioned to Rufus J. Lackland and Dwight Durkee, dated April 19th, 1872, to secure bonds amounting in the aggregate to eight hundred thousand dollars, dated May 1st, 1872, of the description in said bill mentioned, and that said mortgage contains the provisions and conditions therein mentioned.

It *is* also admits that it constructed the railroad therein mentioned, together with the side-tracks, depots, engine-houses, and all the other appurtenances, and purchased the real estate in said bill mentioned.

It *is* also admits that it made and delivered to Jesse Seligman and James Baker the mortgage or deed of trust therein mentioned, dated October 1st, 1873, upon the property therein mentioned, to secure the bonds therein mentioned, and that said mortgage contained the provisions therein mentioned, and that said bonds are still outstanding, and the interest thereon has been duly paid.

This defendant also admits that it executed, made, and delivered to the defendants, Henry F. Vail and James D. Fish, the mortgage or deed of trust in said bill mentioned, dated July 10th, 1875, by which it mort-
gaged to them for the trust therein mentioned all the property
42 and franchises therein described, to secure the bonds in said bill mentioned, denominated third mortgage bonds; and that said mortgage and bonds contained the provisions and conditions and was issued for the purpose in said bill mentioned; and that a demand of the payment of the interest due thereon, as alleged, was duly made and payment refused.

This defendant further admits that it was the owner and lessee of the several railroads mentioned in said bill, and that at the time therein mentioned it leased, transferred, and assigned all the railroads owned by it and leased to it to the said Atlantic & Pacific Railroad Company, in the manner mentioned in said bill, and that the said last mentioned company took possession of the said several railroads at the time mentioned in said bill, and have continued to manage and operate the same since that time. They also admit that since the date of said lease, the said Carondelet Branch Railroad has been constructed, and additional improvements and the purchase of additional rolling stock have been from time to time made since the date of said lease, as in said bill stated. This defendant also states that it is true the said Atlantic & Pacific Railroad Company by the terms of said lease agreed to pay the interest on all the mortgage bonds theretofore issued, and to pay the dividends
on the stock of the Pacific Railroad, as in said bill mentioned,
43 and that default was made in the payment thereof, as therein stated.

It is also true that, in pursuance of said lease, obligations in various forms for the payment of money were from time to time issued by the Atlantic & Pacific Railroad Company in the name of the defendant, and for the payment of which this defendant is liable, and that it is also liable to pay the principal and interest of said third mortgage bonds to Vail and Fish.

It is also true that the said Atlantic & Pacific Railroad Company has made default in the payment of interest upon its bonds, secured by mortgages on the property originally owned by it, before the making of said lease, and has become embarrassed by floating debts to a very large amount, and has been unable to pay the dividends aforesaid, and the interest due November 1st, 1875, on the third mortgage bonds aforesaid.

It is also true that the interest upon the first and second mortgage bonds herein mentioned has been regularly paid as the same became

due, and that the premises conveyed by said mortgage is abundant security for the first two mortgages as they mature.

This defendant, further answering, says that the execution and delivery of the said third mortgage bonds, and the mortgage to secure the same, was done in good faith and for legal and proper purposes, without any fraud or malfeasance on the part of the board of directors
44 or the stockholders of said company in the issue thereof, and constitute a legal and binding obligation on the part of this defendant to pay the same. But it says that it is informed that a portion of said stockholders claim that they are fraudulent and void, and that the directors of this defendant are guilty of fraud in issuing the same.

Therefore this defendant asks this honorable court to *prevent* any of the stockholders aforesaid to become a party defendant to this suit, upon a proper showing, and make such defence in the premises as they may see proper.

In witness whereof the said Pacific Railroad Company has caused these presents to be signed by James Baker, its attorney, and John L. Dearborn, its secretary, and its corporation seal to be hereunto affixed this 7th day of February, 1876.

JAMES BAKER,
Att'y for said Company.

J. L. DEARBORN, *Sec'y.* [SEAL.]

And afterwards, on the 7th day of February, 1876, the following further proceedings were had in said cause, to wit:

GEORGE E. KETCHUM, COMPLAINANT,
vs.
PACIFIC RAILROAD ET AL., DEFENDANTS.

45 Now come the defendants Henry F. Vail and James D. Fish, by Noble & Orrick, their solicitors, and enter appearance herein. Also come the defendants James Baker, Jesse Seligman, E. D. Morgan, Joseph Seligman, Uriel A. Murdock, and Luther C. Clark, by James Baker and Noble & Orrick, their solicitors, and enter their appearance herein, and by leave of court take until next rule day to plead herein.

And afterwards, on the 16th day of February, 1876, C. K. Garrison and others filed their petition to be made parties complainant herein, and which said petition is in the words and figures following, to wit:

In the circuit court of the United States for the eastern district of Missouri.

GEORGE E. KETCHUM, COMPLAINANT,
vs.
THE PACIFIC RAILROAD, THE ATLANTIC & Pacific Railroad Company, James Baker, Rufus J. Lackland, Dwight Durkee, Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, James Punnelt, and Luthur C. Clark, respondents.

To the honorable the judges of the circuit court of the United States for the eastern district of Missouri:

46 Your petitioners, Cornelius K. Garrison and James Seligman,

citizens of the State of New York, and Thomas W. Pierce, a citizen of the State of Massachusetts, respectfully represent that they are the holders and owners of the third mortgage bonds referred to and described in the bill of complaint in the above entitled cause, as follows, to wit: Your petitioners, Cornelius K. Garrison, holds and owns fourteen hundred (1,400) of said bonds, as will appear by affidavit herewith filed; James Seligman holds and owns three hundred and forty-seven (347); and Thomas W. Pierce holds and owns fifty (50) of said bonds; all of which said bonds are dated July 10th, 1875, and secured by a mortgage or deed of trust made to Henry F. Vail and James D. Fish, trustees, dated July 10th, 1875, and particularly described in said bill of complaint.

And your petitioners, upon information and belief, state that the allegations of said bill of complaint, and the matters and facts in said bill contained and stated, are true.

And to the end that your petitioners may be protected in their interest in the said third mortgage and in their said bonds, by them held and owned as aforesaid, they respectfully pray that they may be made parties to the proceedings in said cause, and that they may
47 be joined with the said George E. Ketchum as parties complainant therein, and be permitted to prosecute said suit with the said Ketcham and other owners of the said third mortgage bonds, who may desire to join as complainants herein.

And your petitioners hereby join the said Ketchum in his prayer for the relief by him, the said Ketchum, asked for in said bill of complaint, and for such other and further orders and decrees of this court as may, in view of the allegations of said bill of complaint, *may* seem meet and proper.

CLINE, JAMISON & DAY,
Att'ys for C. K. Garrison.
GROVER & ELLIS,
Att'ys for James Seligman and Thos. W. Pierce.

And afterwards, on the 3rd day of April, A. D. 1876, the following further proceedings were had in said cause, to wit:

GEORGE E. KETCHUM, COMPLAINANT,
vs.
PACIFIC RAILROAD ET AL., DEFENDANTS.

Now come James Seligman and Thomas W. Pierce, by Messrs. Grover & Ellis, their solicitors, on whose motion it is ordered that said
48 Seligman and Pierce have leave to join as complainants with George E. Ketchum herein.

And afterwards, on said 3d day of April, 1876, the following further proceedings were had in said cause, to wit:

GEORGE E. KETCHUM ET AL., COMPLAINANTS,
vs.
PACIFIC RAILROAD ET AL., DEFENDANTS.

Now comes C. K. Garrison, by Messrs. Cline, Jamison & Day, his solicitors, on whose motion leave is granted said C. K. Garrison to join with complainant in the prosecution of this cause. * * *

And again, on said 3d day of April, 1876, the following further proceedings were had in said cause, to wit:

49 GEORGE E. KETCHUM, PLAINTIFF,
vs.
THE PACIFIC RAILROAD, THE ATLANTIC & PACIFIC Railroad Company, James Baker, Rufus J. Lackland, Dwight Durkee, Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, and Luther C. Clark, defendants.

This cause having this day come on for hearing on the application and motion of the complainant for the appointment of a receiver or receivers of the property, effects, rights and franchises mentioned in said bill of complaint herein:

And the same having been duly heard, by solicitors James O. Broadhead, esq., of counsel for complainant, and James Baker, esq., of counsel for the Pacific Railroad, the Atlantic & Pacific Railroad Company, and for himself, and A. M. Gardner, esq., of counsel for Rufus J. Lackland and Dwight Durkee, and Messrs. Noble & Orrick, of counsel for Henry F. Vail and James D. Fish, Thomas J Portis, esq, of counsel for Jesse Seligman, E. D. Morgan, and Joseph Seligman, and appearing and assenting to this order, and the court being sufficiently advised in the premises,

It is ordered, adjudged, and decreed that Oliver Garrison, John H. Beach and Joseph L. Stephens, of the State of Missouri, be, and they are hereby, appointed receivers in this case, with full power to enter and take possession of the railroad of said "Pacific Railroad" (corporation), in the State of Missouri and elsewhere, and all its branches
50 and leased lines, together with all side tracks, switches, station-houses and all other houses, rights of way and grounds in use, or necessary or convenient to be used in operating said roads; also, all machine-shops, machinery, work-shops, tools and implements belonging to said company; and all engines, cars, and rolling-stock of every kind owned and belonging to said company or leased by it, and all supplies, fuel, iron, and material owned and belonging to said company, and all moneys, credits, choses in action, and all other claims and demands of whatever nature to which it is entitled, and all other property, real and personal, of whatever nature or description, and wherever situated, belonging to said company, and the same to hold and use under this or such further orders as may from time to time hereafter be made by this court; and that, until otherwise ordered, the said receivers shall operate all of said roads and branches throughout the whole extent thereof according to the usual course of business thereof, and to the best advantage for the interest of all parties concerned, and generally to maintain said roads, their rolling stock, fixtures and appurtenances in good order and in an efficient and safe condition; and for that purpose to purchase, for cash or on credit, or partly for both, material and supplies whenever necessary. And as the court finds that the lease of the Pacific Railroad to the Atlantic & Pacific Railroad Company, entered into on the 29th day of June, 1872, did, by the provisions of said deed of lease, and by the action of the respective companies, parties thereto, terminate on the 7th day of March, 1876, and that since that time the earnings and receipts

from said respective roads properly and rightfully inured to the benefit of the company owning the same,

It is ordered that all moneys now due for or on account of the business transacted by or over the said Pacific Railroads, and the leased lines and branches pertaining thereto, be paid to and received by the receivers herein appointed, and that they have full power to collect and receipt for the same; and that the books and accounts in the hands of the said receivers of said Atlantic & Pacific Railroad, heretofore appointed as aforesaid by this court, of all the business and other transactions in respect to the operation and management of the said Pacific Railroad, its
51 leased lines and branches, be subject at all times to the inspection and free use of the receivers hereby appointed, and their agents and servants; and that they be permitted to take copies of all or such parts thereof as they may deem proper.

It is further ordered that the receivers hereby appointed shall, out of the earnings of the railroads under their charge, or out of any other money that may come into their hands as such receivers, pay, at maturity, such parts of any certificates of indebtedness as may have heretofore been issued by the receivers of said Atlantic & Pacific Railroad, under the orders of this court, to pay any indebtedness on account of said Pacific Railroad, including the interest of its bonded indebtedness, or for the purchase of supplies that have been used on the same; and that they may have power to purchase and in like manner pay for any or all the supplies, material and fuel on the lines of the roads under their control heretofore purchased by said Atlantic & Pacific Railroad Company, which are liens thereon, or which have been purchased by the receivers of said Atlantic & Pacific Railroad, and justly chargeable to said Pacific Railroad and its branches and leased lines.

It is further ordered that Henry F. Vail and James D. Fish, the trustees created by and mentioned in said third mortgage on said Pacific Railroad, be, and they are hereby, authorized to exchange such of the bonds secured by said mortgage as may now be in their hands for that purpose for such of the income and improvement bonds as have not yet been exchanged for as provided in said mortgage deed; and that, in case of their failure or refusal so to do, the receivers hereby appointed have full power and authority to make such exchange, reserving all rights and questions concerning the validity of said bonds and mortgage.

It is further ordered that said receivers be and they are hereby authorized and empowered out of the property and earnings of the said Pacific Railroad to redeem any and all other bonds or stocks belonging to the said Pacific Railroad, which have heretofore been pledged or hypothecated to secure any of its indebtedness which, in their judgment and discretion, will be beneficial to the estate in their charge to pay.

52 And the said receivers are hereby authorized and empowered to employ and pay all such agents, servants, laborers, clerks and assistants as in their discretion may be necessary under them to carry this order into effect with economy and prudence, and to make, enter into and perform all necessary contracts for the purchase of supplies; and for the prosecution of said business they are hereby further ordered and required to keep and cause to be kept in regular and systematic order, strict and regular accounts of all the business of said trust in their hands, and of the daily receipts and disbursements of money, so as to keep distinct and separate the receipts and disbursements of the roads aforesaid, earned and expended by and on the Pacific Railroad, and the lines heretofore leased to that company, and so as to show the earnings

and expenditures by and on account of each leased line and branch road on the part of said road lying in the State of Kansas, and elsewhere out of the State of Missouri, and showing the mode of division of through business passing from and over two or more of said lines, and showing the items in detail.

The said receivers are hereby required to file in the office of the clerk of the court, within the first twenty days of each month, a detailed account of all their receipts and expenditures for the preceding month; and they shall also file a detailed statement of all materials purchased and the price paid or to be paid for the same.

The receivers shall also pay in like manner, out of the property and earnings of each road, all sums which are now or may hereafter become due for taxes upon any of the property of such road coming to their hands as receivers; and also all interest or principal due or to become due upon any purchase of property which comes to their hands as receivers, and which, in the judgment of the said receivers, it will be beneficial to the estate in their possession to pay.

They are hereby further authorized and empowered to appropriate and apply the property, money and effects aforesaid, vested in them as aforesaid, with the current earnings of the said roads and business, so far as the same may be necessary to the objects and purposes of this trust, under the direction of this court, for the use and benefit of such
53 parties as may be found entitled thereto; and if, after making all payments hereinbefore authorized, there shall remain in the hands of said receivers, at any time, any surplus moneys, they shall report the same to this court, as to the disposition of the same.

And the said receivers are further directed to proceed with all practicable dispatch, after they enter upon the discharge of their duties, to take an inventory of all and singular the property and effects of every description of the respective roads, which may come to their possession, or under their control, in virtue of this order, noting the present condition, and to file such inventory in this court.

And the receivers are further empowered in their discretion to remove any of the officers or employees of said railroad company, other than the president and directors thereof, and such other officers as pertain to and are necessary to maintain the corporate organization; but notwithstanding this reservation, the entire management of said road, and the power to appoint and remove all superintendents, engineers, and other agents and employees, in any way concerned in operating the said road, shall belong to the receivers. The receivers, acting in pursuance of this, or any order or decree of this court herein, in good faith, shall not be individually liable for any breach of any contract entered into by them as such receivers, or for the fulfillment of any obligation entered into by them as such receivers, or for any injury to the person or property of the parties, or of third persons, or for the faults or negligence of their subordinates; but the property, moneys, and effects that shall, at any time, be in their hands as such receivers, shall be bound for all such breaches or wrong, and may, from time to time, as may be necessary, be applied in such manner as this court shall direct.

It is further ordered, that each of said receivers, before entering on their duties as aforesaid, shall, within ten days from the date of this order, enter into a bond, with two or more securities, to the acceptance of this court, or one of the judges thereof, in the penal sum of five hundred thousand (500,000) dollars, conditioned for the faithful performance of all duties enjoined upon them.

And it is further ordered, that each of said receivers shall with-

54 out delay take an oath before a judge or the clerk of this court, faithfully to perform his duties as receiver in this cause.

It is further ordered, that the said receivers be authorized to institute and prosecute and defend any and all suits which in their judgment may be necessary to protect the property and interests intrusted to their charge, and to defend all suits which may be brought against them as receivers, or against the Pacific Railroad, and to execute all bonds or obligations which it may be necessary or proper to be executed in the prosecution or defense of such suits, and to do and perform all matters and things necessary in the prosecution or defense of such suits.

It is further ordered that said receivers be authorized to pay all indebtedness of said Pacific Railroad heretofore contracted for supplies, material, and fuel used on said Pacific Railroad, its leased lines and branches, which are a lien thereon, and which they may deem just and proper; and if at any time there is not sufficient money in their hands arising from the earnings of said railroad and other sources, that they have authority and power to borrow the same, not exceeding $300,000, and issue their certificates therefor, payable at such times as they may deem proper, not to exceed six months from the date thereof, to bear interest at a rate not exceeding eight per cent. per annum, which, if not paid out of said receipts prior to any foreclosure of the mortgage sued on in this case, shall be paid out of the proceeds of the sale of the property so mortgaged when made.

It is further ordered that the receivers hereby appointed shall pay all debts and obligations of every nature and kind heretofore contracted by the said receivers of the Atlantic & Pacific Railroad, since their appointment, for and on account of the said Pacific Railroad, and that none of the equities of any of the parties in interest shall be affected thereby, but the determination of the same is hereby reserved for the future action of this court; and that, for the purpose of enabling this court to properly settle their respective equitable rights, the matter is referred to S. D. Thompson, a master in chancery, to take an account be-

55 tween said Atlantic & Pacific Railroad Company and said Pacific Railroad.

It is further ordered that said receivers have power and authority to pay to the county of St. Louis, and are hereby directed to pay the solicitor of said county the amount of interest now due to said county, to wit, $41,000, including March, 1876, for and on account of the interest now due on the indebtedness to said county for $700,000 of its bonds loaned by it to said railroad company. But such payment shall not in anywise be construed into a recognition or admission of any right of lien in behalf of said county on the income or property of said railroad company.

It is further ordered that the receivers hereby appointed shall keep a record of their proceedings and of all orders made by them, that in case of the absence of one of their number a majority may act, but any one who may dissent may have his objection noted on the record, and may by petition refer the matter to the court for its opinion and order thereon. Such dissent, when entered of record, shall have the effect of relieving the receiver so dissenting and his securities from all liability on account of all such order or act.

It is further ordered, that the cross-bill of Thomas P. Akers, heretofore filed, be taken from the files of the court, as the same is found to be in defective form.

It is further ordered, that leave be given to Thomas P. Akers as a stockholder, and the county of St. Louis, claiming to be a stockholder or

trustee for stockholders, to file an amended cross-bill herein within thirty days, upon giving security for costs in the sum of $5,000.

It is further ordered that leave be granted to the county of St. Louis to make answer to the bill of foreclosure in this cause and defend against the same.

It is further ordered, that each of the receivers aforesaid be paid for his services as such receiver at the rate of five thousand dollars per year, and all necessary expenses incurred by him while away from his home in the discharge of his duties as such receiver.

It is further ordered that the receivers give immediate atten-
56 tion to the settlement and payment of all just and proper taxes assessed upon the said road and its properties.

57 And afterwards, on the 5th day of June, 1876, the defendants Lackland and Durkee filed the following joint answer to the bill of complaint herein, to wit:

Answer of Rufus J. Lackland and Dwight Durkee to the bill of complaint herein.

In the circuit court of the United States for the eastern district of Missouri.

GEORGE E. KETCHUM
vs.
THE PACIFIC RAILROAD, THE ATLANTIC AND Pacific Railroad Company, James Baker, Rufus J. Lackland, Dwight Durkee, Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, and Luther C. Clark.

And now on this day come the defendants, Rufus J. Lackland and Dwight Durkee, by A. M. Gardner, their solicitor, and for a separate answer to the bill of complaint in this cause say that true it is that the said Pacific Railroad executed the mortgage or deed of trust, and the several series of bonds mentioned and set forth in said bill of complaint, and that the said Rufus J. Lackland and Dwight Durkee were made trustees in and by the said mortgage executed to them on the 19th day of
58 April, 1872, to secure eight hundred thousand dollars in bonds of the same date, and of the character and description mentioned in said bill of complaint, and now are such trustees. And they further say that they know of no reason why the prayer of complainant's bill should not be granted.

A. M. GARDNER,
Solicitor for Def'ts Lackland & Durkee.

And also on said 5th day of June, 1876, the defendant, The Atlantic and Pacific Railroad Company, filed the following answer to the bill of complaint herein, to wit:

GEORGE E. KETCHUM, WITH WHOM ARE JOINED C. K. Garrison & others, complainants,
vs.
PACIFIC RAILROAD AND OTHERS, DEFENDANTS.

Now comes the Atlantic and Pacific Railroad Company, defendant in

54 out delay take an oath before a judge or the clerk of this court, faithfully to perform his duties as receiver in this cause.

It is further ordered, that the said receivers be authorized to institute and prosecute and defend any and all suits which in their judgment may be necessary to protect the property and interests intrusted to their charge, and to defend all suits which may be brought against them as receivers, or against the Pacific Railroad, and to execute all bonds or obligations which it may be necessary or proper to be executed in the prosecution or defense of such suits, and to do and perform all matters and things necessary in the prosecution or defense of such suits.

It is further ordered that said receivers be authorized to pay all indebtedness of said Pacific Railroad heretofore contracted for supplies, material, and fuel used on said Pacific Railroad, its leased lines and branches, which are a lien thereon, and which they may deem just and proper; and if at any time there is not sufficient money in their hands arising from the earnings of said railroad and other sources, that they have authority and power to borrow the same, not exceeding $300,000, and issue their certificates therefor, payable at such times as they may deem proper, not to exceed six months from the date thereof, to bear interest at a rate not exceeding eight per cent. per annum, which, if not paid out of said receipts prior to any foreclosure of the mortgage sued on in this case, shall be paid out of the proceeds of the sale of the property so mortgaged when made.

It is further ordered that the receivers hereby appointed shall pay all debts and obligations of every nature and kind heretofore contracted by the said receivers of the Atlantic & Pacific Railroad, since their appointment, for and on account of the said Pacific Railroad, and that none of the equities of any of the parties in interest shall be affected thereby, but the determination of the same is hereby reserved for the future action of this court; and that, for the purpose of enabling this court to properly settle their respective equitable rights, the matter is referred to S. D. Thompson, a master in chancery, to take an account be-

55 tween said Atlantic & Pacific Railroad Company and said Pacific Railroad.

It is further ordered that said receivers have power and authority to pay to the county of St. Louis, and are hereby directed to pay the solicitor of said county the amount of interest now due to said county, to wit, $41,000, including March, 1876, for and on account of the interest now due on the indebtedness to said county for $700,000 of its bonds loaned by it to said railroad company. But such payment shall not in anywise be construed into a recognition or admission of any right of lien in behalf of said county on the income or property of said railroad company.

It is further ordered that the receivers hereby appointed shall keep a record of their proceedings and of all orders made by them, that in case of the absence of one of their number a majority may act, but any one who may dissent may have his objection noted on the record, and may by petition refer the matter to the court for its opinion and order thereon. Such dissent, when entered of record, shall have the effect of relieving the receiver so dissenting and his securities from all liability on account of all such order or act.

It is further ordered, that the cross-bill of Thomas P. Akers, heretofore filed, be taken from the files of the court, as the same is found to be in defective form.

It is further ordered, that leave be given to Thomas P. Akers as a stockholder, and the county of St. Louis, claiming to be a stockholder or

trustee for stockholders, to file an amended cross-bill herein within thirty days, upon giving security for costs in the sum of $5,000.

It is further ordered that leave be granted to the county of St. Louis to make answer to the bill of foreclosure in this cause and defend against the same.

It is further ordered, that each of the receivers aforesaid be paid for his services as such receiver at the rate of five thousand dollars per year, and all necessary expenses incurred by him while away from his home in the discharge of his duties as such receiver.

It is further ordered that the receivers give immediate atten-
56 tion to the settlement and payment of all just and proper taxes assessed upon the said road and its properties.

57 And afterwards, on the 5th day of June, 1876, the defendants Lackland and Durkee filed the following joint answer to the bill of complaint herein, to wit:

Answer of Rufus J. Lackland and Dwight Durkee to the bill of complaint herein.

In the circuit court of the United States for the eastern district of Missouri.

GEORGE E. KETCHUM
vs.
THE PACIFIC RAILROAD, THE ATLANTIC AND Pacific Railroad Company, James Baker, Rufus J. Lackland, Dwight Durkee, Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, and Luther C. Clark.

And now on this day come the defendants, Rufus J. Lackland and Dwight Durkee, by A. M. Gardner, their solicitor, and for a separate answer to the bill of complaint in this cause say that true it is that the said Pacific Railroad executed the mortgage or deed of trust, and the several series of bonds mentioned and set forth in said bill of complaint, and that the said Rufus J. Lackland and Dwight Durkee were made trustees in and by the said mortgage executed to them on the 19th day of
58 April, 1872, to secure eight hundred thousand dollars in bonds of the same date, and of the character and description mentioned in said bill of complaint, and now are such trustees. And they further say that they know of no reason why the prayer of complainant's bill should not be granted.

A. M. GARDNER,
Solicitor for Def'ts Lackland & Durkee.

And also on said 5th day of June, 1876, the defendant, The Atlantic and Pacific Railroad Company, filed the following answer to the bill of complaint herein, to wit:

GEORGE E. KETCHUM, WITH WHOM ARE JOINED C. K. Garrison & others, complainants,
vs.
PACIFIC RAILROAD AND OTHERS, DEFENDANTS.

Now comes the Atlantic and Pacific Railroad Company, defendant in

the above-entitled cause, and files this its answer, under its seal, to the bill of complaint in the above-entitled cause, and says that the allegations and averments in said bill are true.

This defendant says that it is true that it is a corporation created in the manner, and with the powers mentioned in said bill; that it is also true that the Pacific Railroad is a corporation with the powers
59 mentioned in said bill, and that said last-named corporation executed the several mortgages and conveyances, mortgages and deeds of trusts in said bill of complaint mentioned, were duly executed and delivered as therein stated.

It is also true, as this defendant is advised and believes, that all of said mortgages and deeds of trust were executed in good faith, and for the sole purpose of properly securing the just debts of said Pacific Railroad.

This defendant further says that it is also true that at the time and in the manner alleged the said Pacific Railroad did make the said lease of date of June 29th, 1872, to this defendant, the terms of which lease are correctly stated in substance in said bill; and it is also true that this defendant is in default in compliance with the provisions of the said lease required of it, as stated in said bill.

It is also true that there is a large sum of money due for taxes remaining unpaid, for which both this defendant and the Pacific Railroad were at the date of the institution of this suit .

It is also true that this defendant and the Pacific Railroad are both without sufficient means to pay or discharge their several valid obligations, and that the commercial paper of each of said corpo-
60 rations has been protested for non-payment.

This defendant knows of no reason why the plaintiffs in the above-entitled suit should not have their lien and rights as set out in said bill, enforced, and this defendant prays the court to protect all its rights and interests in the premises.

[L. S.] ATLANTIC & PACIFIC RAILROAD CO.,
By SAMUEL HAYS, *Vice Pres't.*

J. N. LITTON,
Of Counsel and Solicitor for the Atlantic & Pacific Railroad Co.

And again, on said 5th day of June, 1876, the defendants, Uriel A. Murdock and others, filed their joint answer to the bill of complaint herein, in words and figures as follows:

Answer of Uriel A. Murdock, Luther C. Clark, Edwin D. Morgan, Joseph Seligman, James Baker, and Jesse Seligman to the bill of complaint.

In the circuit court of the United States for the eastern district of Missouri.

GEORGE E. KETCHUM
vs.
THE PACIFIC RAILROAD, THE ATLANTIC AND Pacific Railroad Company, James Baker, Rufus J. Lackland, Dwight Durkee, Jesse Seligman, Henry F. Vail, James D. Fish, Edwin D. Morgan, Joseph Seligman, Uriel A. Murdock, and Luther C. Clark.

61 And now on this day come the defendants, Uriel A. Murdock Luther C. Clark, Edwin D. Morgan, Joseph Seligman, James

Baker, and Jesse Seligman, by James Baker, their solicitor, and for answer to the bill of complaint in this cause say that true it is that the said Pacific Railroad executed the several mortgages or deeds of trust, and the several series of bonds mentioned and set forth in said bill of complaint, and that the said Murdock and Clark were made trustees in and by the said mortgage executed to them on the 15th day of July, 1868, to secure seven millions of dollars in bonds of the same date, and of the character and description mentioned in said bill of complaint, and now are such trustees; and that the said Morgan and Joseph Seligman were made trustees in and by the said mortgage executed to them on the first day of July, 1871, to secure the payment of three millions of dollars in bonds of the same date, which are of the same description mentioned in said bill, and now are such trustees.

It is also true that the said Baker and Jesse Seligman were made trustees in and by the said mortgage executed to them on the
62 first day of October, 1873, to secure the payment of a series of bonds of the same date, amounting in the aggregate to five hundred thousand dollars. It is also true that the interest on all of the aforesaid bonds have been regularly and promptly paid at maturity, according to the tenor and effect of said bonds.

These defendants ask that the interest and rights of the holders of said bonds, and that the rights and powers of these defendants may be fully protected by this honorable court.

JAMES BAKER,
Solicitor for said Defendants.

And afterwards, on the 6th day of June, 1876, the defendants, Vail and Fish, filed the following answer to the bill of complaint herein, to wit:

In the circuit court of the U. S. for the eastern district of Missouri.

GEORGE E. KETCHUM ET AL.
vs.
THE PACIFIC RAILROAD ET AL.

The defendants, Henry F. Vail and James D. Fish, by Noble and Orrick, their attorneys, answering the bill of complaint of the said George E. Ketchum, say:

63 1st. That it is true as alleged in said bill of complaint that they are trustees in the deed of trust therein described, dated July 10th, 1875, made by the said Pacific Railroad to these defendants as trustees.

2d. These defendants admit that the allegations of said bill of complaint are true, as they are informed and believe. And these defendants, as trustees of the several and varied interests of the bondholders secured by said deed of trust, submit the same to the judgment of this honorable court, that the same may be duly provided for and protected, and ask that they may have such relief, including an allowance for their costs and expenses herein, as to your honorable court may seem meet.

NOBLE & ORRICK,
Attorneys for Vail and Fish, Defendants.

Answer under oath is hereby waived.

CLINE, JAMISON & DAY, AND
JAMES O. BROADHEAD,
64 *Attorneys for Complainants.*

65 Be it remembered that on the sixth day of June, A. D. 1876, at an adjourned session of the March term of the circuit court of the United States in and for the eastern district of Missouri, the following proceedings were had and appear of record, to wit:

Decree of foreclosure.

GEORGE E. KETCHUM ET AL., COMPLAINANTS,
vs.
THE PACIFIC RAILROAD, THE ATLANTIC AND Pacific Railroad Company et al., defendants.
} In chancery. No. 703.

And now at this day come the said complainant, by James O. Broadhead, his solicitor, and Cornelius K. Garrison, who, by the order of this court, has been made a co-complainant herein, by his solicitors, Cline, Jamison & Day, and also James Seligman and Thomas W. Pierce, who have also by the order of this court been made co complainants herein, by their solicitors, Grover & Ellis; and also the defendants, The Atlantic and Pacific Railroad Company, by its solicitor, Joseph N. Litton, and the Pacific Railroad by James Baker, its solicitor; and the said Rufus J. Lackland and Dwight Durkee appearing by their solicitor, A. M. Gardner, and the said Jesse Seligman, Edwin D. Morgan, Uriel A. Murdock, Joseph Seligman, Luther C. Clark appearing by their solicitor, James Baker, and the said Henry F. Vail and James D. Fish appearing by their solicitors, Noble & Orrick; and the said James
66 Baker appearing in his own proper person; and it having been suggested to the court that James Punnett has departed this life since the institution of this suit, it is ordered by the court that this suit abate as to him.

And therefore the said cause coming on to be heard upon the bill of said complainant and the answers of said defendants and the exhibits and proofs in the cause, the county of St. Louis and Thomas P. Akers appear by their solicitor, Frank J. Bowman, and dismiss their answers and cross-bills, and Frank J. Bowman, as solicitor for the county of St. Louis, withdraws the separate answer of the county contesting the validity of said bonds; and it appearing to the court that the Pacific Railroad did on the 10th day of July, A. D. 1875, make and deliver to the said Henry F. Vail and James D. Fish its mortgage or deed of trust of that date, by which the said Pacific Railroad did convey and mortgage to the said Vail and Fish all the property, real and personal, rights, interests, and franchises of the said Pacific Railroad, as set forth in the said mortgage of the date last above referred to and more particularly described as follows, that is to say:

1. All and singular the entire line of the Pacific Railroad [of Missouri], two hundred and eighty-three miles in length, extending from the depot at Seventh street in the city of St. Louis, State of Missouri, to the western boundary of said State, at Kansas City, and passing through the counties of St. Louis, Franklin, Gasconade, Osage, Cole, Moniteau, Morgan, Cooper, Pettis, Johnson, Cass, and Jackson, in said State of Missouri, with its appurtenances, including, among other things, the track on Poplar street and the levee in the city of St. Louis, commonly known as the "Poplar street track," and including the real estate, depots, stations, machine-shops, rolling stock, machinery, rights, and interests, and franchises of the said railroad, subject to the liens of the two mortgages described in the bill of complaint severally executed by the said Pacific Railroad, one of which was so executed to

67 said Murdock, Punnett, and Clark, and the *and the* other of which was executed to Edwin D. Morgan and Joseph Seligman.

2. All and singular the following described real estate in the city of St. Louis, State of Missouri, viz: Four blocks of ground in the city of St. Louis, being city blocks numbered four hundred and eighteen, four hundred and twenty-three, four hundred and twenty-eight, and four hundred and thirty-three, bounded east by Seventh street, south by Cerre street, west by Eleventh street, and north by Poplar street.

Also block number two hundred and thirteen, of the city of St. Louis, bounded east by Twelfth street, south by Austin street, west by Fourteenth street, and north by Randolph street—saving and excepting therefrom lots 26, 29, 33, and 34, the north one-half of lot number 36, and part of lot number 25, embracing the southwest corner of said block, sixty-six feet eight inches on Fourteenth street, by one hundred feet on Austin street.

Also the following described real estate in city block number four hundred and thirty-eight, viz:

Beginning at the northwest corner of Eleventh and Cerre streets in the city of St. Louis, the southeast corner of said block; thence west along the north side of Cerre street one hundred and fifty-two feet and six inches, more or less, to an alley; thence north one hundred feet; thence east, parallel to Cerre street, one hundred and fifty-two feet and six inches, to Eleventh street; thence southwardly on the line of Eleventh street to the place of beginning.

Also the following, viz: Commencing at the southwest corner of city block number four hundred and thirty-eight, the northeast corner of Twelfth and Cerre streets; thence north one hundred and four feet and six inches; thence east one hundred and fifty-two feet and six inches to an alley; thence south one hundred and four feet six inches to Cerre street; thence west one hundred and fifty-two feet six inches to Twelfth street, the place of beginning.

68 And also the following described tract or parcel of land, viz: Commencing at the northwest corner of city block number four hundred and thirty-nine, the southeast corner of Twelfth and Cerre streets; thence south one hundred and seventy-six feet, more or less, to the south line of property of the Pacific Railroad; thence eastwardly, along said south line, to the northeast corner of said block four hundred and thirty-nine; thence along the south line of Cerre street to the place of beginning; being the same property mentioned and described in the bill of complaint as covered by the mortgage executed to Lackland and Durkee, and said premises being conveyed subject to the lien of said last mentioned mortgage.

3. All and singular the branch railroad of the said Pacific Railroad, constructed and operated, and extending from a point on the main line at or near Kirkwood, thence to the termination of the said railroad at the Mississippi River at Carondelet or South St. Louis, with its appurtenances, including the depots, stations, machine-shops, superstructures, and erections on the line of said branch railroad, or at Carondelet aforesaid, together with all the side tracks and switches connected with said branch railroad, and also all the lands acquired and appropriated, or that may be acquired or appropriated for depots, engine-houses, car-houses, station-houses, warehouses, machine-shops, or other superstructures and erections, on the line of said branch railroad, or at Carondelet aforesaid; which said last mentioned premises and property were so mortgaged, subject to the lien of a mortgage, to Jesse Seligman and James Baker, described in the bill of complaint.

Which said deed of trust or mortgage dated July 10th, 1875, was made to said Vail and Fish, described in the bill of complaint, as trustees and in trust to secure the payment of an issue of four thousand bonds, there in termed "Third mortgage bonds," of one thousand dollars each, dated July 10th, 1875, payable twenty years after date, to bearer in lawful money of the United States, at the office of the Atlantic & Pacific
69 Railroad Company, in New York, with interest at seven per cent. per annum, from May 1st, A. D. 1875, in like lawful money, semi-annually on the first of November and May in each year, on the presentation of the coupons annexed to said bonds. And it further appearing that said mortgage or deed of trust provides that if the said Pacific Railroad should fail to pay the interest on any of the said bonds thereby secured, for six months after the same should become due and payable and demand made therefor, said trustees were authorized and required, on the written request of the holders of bonds to the amount of five hundred thousand dollars, the principal or interest of which should then be in arrears or unpaid, to sell the said railroad and branch road in the complainants' bill described and set forth, and all the property by said mortgage conveyed, at public auction in the city of St. Louis, at the time, on the terms, and in the manner set forth and described in the said mortgage; and to apply the net proceeds of said sale to the payment of all the bonds secured by said mortgage and then unpaid, pro rata.

And it further appearing that the said Pacific Railroad had, prior to the said 10th day of July, A. D. 1875, issued its bonds amounting in the aggregate to the sum of fifteen hundred thousand dollars and designated as "income bonds," each of which bonds was dated September 2d, 1872, and of which one thousand were for one thousand dollars each, and eight hundred were for five hundred dollars each, and one thousand for one hundred dollars each, payable on the first of September, 1892, with interest at seven per cent. per annum—on the first of March and September of each year; and it further appearing that the said Pacific Railroad had made a further issue of bonds, amounting in the aggregate to the principal sum of two millions of dollars and designated as "improvement bonds," consisting of two thousand bonds of one thousand dollars each, and dated December 15th, 1874, payable on the first of November, 1889, with interest at seven per cent. per annum, pay-
70 able on the first of May and November in each year, on the presentation of the coupons annexed to said bonds; and it further appearin g to the court that by the terms of said "third mortgage" it was provided that the said third mortgage bonds should be used in retiring and canceling the said issue of income bonds and improvement bonds, so far as the same could be done; and it further appearing that the entire amount of third mortgage bonds secured by said mortgage were issued by said Pacific Railroad, and that a sufficient number of said bonds were placed in the hands of the trustees in said third mortgage mentioned, to wit, the said Vail and Fish, for the purpose of being exchanged for "income" and "improvement bonds;" and it further appearing that a portion of said bonds have been exchanged for "income" and "improvement bonds," and that a portion of said bonds have been negotiated by said company; and it further appearing that a number of said bonds are now in the possession of the said trustees, Vail and Fish; and it further appearing that of the said third mortgage bonds now outstanding, none of the interest which became tue on said bonds, or any of them on the first day of November, A. D. 1875, has been paid, but that the whole amount thereof remains due

and unpaid; and it further appearing that the said complainant, George E. Ketchum, is the holder and owner of ten of said "third mortgage bonds" secured by the aforesaid mortgage or deed of trust; that the said Cornelius K. Garrison is the owner and holder of fourteen hundred of said bonds, and that the said James Seligman is the owner and holder of three hundred and forty-seven of said bonds; and that the said Thomas W. Pierce is the owner and holder of fifty of said bonds, secured by said mortgage, and that the payment of the interest which became due on said eighteen hundred and seven bonds on the first day of November, A. D. 1875, was duly demanded on said day according to the tenor of said mortgage, and that the coupons representing said interest were presented for payment at the place where the same by the terms thereof are payable, and pay-
71 ment thereof demanded and refused. And it further appearing to the court that the interest of the said complainant and the interests of other holders of like bonds may be seriously affected by delay in the institution of proceedings to foreclose the said mortgage, inasmuch as by the terms of said mortgage the said trustees are not authorized to sell the property secured by said mortgage until six months after demand made for the payment of said interest:

Now, therefore, the court, being fully advised in the premises, and by the consent of all the parties to this suit through their solicitors of record, thereupon and in consideration thereof, it is ordered, adjudged, and decreed as follows, to wit:

That the said Pacific Railroad do stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to the said mortgaged premises, property, and franchises, and that the said Pacific Railway and property, together with the franchises and appurtenances of the said railway company as in said deed of trust or mortgage dated July 10, 1875, is described, be sold at public auction by Seymour D. Thompson, master in chancery of this court, to pay and satisfy the amounts due by said company upon said bonds and any other indebtedness which the court may order to be paid out of the proceeds of said sale, together with the costs of suit and of said sale, including the services of said trustees and their solicitor's and attorney's fees in and about the management of said trust as may hereafter be ordered by this court; and that upon said sale the said master shall execute a certificate stating such sale and setting out the terms and conditions thereof, and that he report said sale and the terms and conditions thereof immediately after said sale to the court; and that upon the terms of such sale being complied with, and the sale approved and confirmed by the court, said master be, and he is hereby, authorized and directed to execute and deliver to the purchaser or purchasers of said property good and sufficient deed or deeds for the same.

72 And it is further ordered that upon the sale of the said road, property, and franchises the said Seymour D. Thompson, master, shall require the payment by the purchaser of the sum of at least two hundred thousand dollars in cash, or the delivery to him of a good and sufficient bond with sureties to be by him approved, for the payment of such sum of $200,000 when and as soon as thereto required by the court.

And it is further ordered and decreed that the terms and conditions of said sale shall be the payment of said sum of two hundred thousand dollars cash or the execution and delivery of the bond hereinbefore specified on the delivery of the certificate of sale by said master, and that the balance of the sum bid shall, unless the purchaser be a bond-

holder or shall represent bondholders, be paid in cash at the confirmation of said sale, should said sale be confirmed; and if said purchaser shall be a bondholder or represent bona fide bondholders, then and in that event, should said sale be confirmed, he shall pay or cause to be paid in cash said sum of two hundred thousand dollars, and also the pro rata proportion from the proceeds of such sale which may be by the said court then found due to the other bona fide bondholders, and the balance after such cash payment may be paid in bonds, bona fide owned or represented by him, the court expressly reserving for future consideration all questions as to the rights, priorities, and interests of all parties claiming any interest herein by way of bonds or otherwise.

And it is further ordered that the said master shall designate the time of making such sale, and shall advertise the same, together with a description of the property and franchises to be sold, by publication, showing the time, terms, and place of sale and the property and franchises to be sold, to be inserted in the St. Louis Globe-Democrat, published in the city of St. Louis, Missouri, in the Evening Post, published in the city of New York, and in the Boston Journal, published in
73 the city of Boston, for the period of sixty days in each of said newspapers, the same to be inserted in each of said papers once a week during the first three weeks of said period, three times a week during the second three weeks of said period, and once every secular day during the remaining portion of said period of sixty days, the last insertion to be at least two weeks before the day of such sale. And the receivers are directed, on the certificate of the master, to audit and pay the expenses of such advertising, and also the expenses of printing this decree.

It is further ordered, adjudged, and decreed that all the premises, property, and franchises covered by and embraced in the said mortgage sued on, viz, the mortgage dated July 10th, 1875, shall be sold in a body and not separately, so that the purchaser or purchasers at said sale shall acquire the whole of the property, premises, and franchises embraced in said last-named mortgage, subject to all prior mortgages.

It is further ordered, adjudged, and decreed that in case said road, property, and franchises shall be purchased by bondholders, or by trustees for bondholders, then at any time within sixty days after said sale any bona fide holder or holders of said third-mortgage bonds, secured by the mortgage sued on in this case, shall be allowed to become associated with said original purchaser or purchasers, in the property purchased, in the proportion that the bonds so held by him or them bears to the whole number of bonds issued, upon the same terms and conditions, with the same rights, subject to the same burdens and under the same scheme as may be provided for or agreed upon by said original purchaser or purchasers, for the purchasing and managing the property purchased, or for creating a corporation to which said property may be conveyed: provided, that at the time of his election to share in such purchase, he shall pay his proportion of the money and expenses paid by the original purchaser.

It is further ordered, adjudged, and decreed that any person or
74 persons holding any of the "income bonds" or the "improvement bonds" above referred to, be and they are hereby authorized, at any time before the sale of said property, to exchange their income or improvement bonds for third-mortgage bonds now held by the said trustees, Vail and Fish, as is provided in said third mortgage.

It is further ordered, adjudged, and decreed that nothing in this decree contained shall be construed to prejudice in any manner the claim

of the county of St. Louis to a lien on the property and franchises of the said Pacific Railroad, alleged by the said county to exist, as fully appears by the amended petition in this cause filed by the said county for securing the payment of a certain debt of the said Pacific Railroad to said county for the sum of $700,000, and interest thereon, and alleged and claimed by the said county of St. Louis to be a prior lien therefor over all other incumbrances upon said property and franchises, the question of the existence and priority of said lien to be hereafter determined by this court, if not otherwise satisfactorily adjusted.

And it is further ordered and decreed that nothing herein contained, or proceedings had in this cause, shall in any manner affect the rights of the Boonville Branch Railroad, or its rights to rent therefor.

It is further ordered, adjudged, and decreed that any party purchasing under this decree shall, in addition to the two hundred thousand dollars provided to be paid as above, pay in cash such further sum, not exceeding two hundred thousand dollars, as and when this court may require and direct to be paid, for the purpose of satisfying any statutory, equitable, or other lien claims that have been, or may be, filed in this case, or in the case of Calvin Littlefield v. The Atlantic and Pacific Railroad Company and others, pending in this court, and which have been, or may hereafter be, directed by the court to be paid by the receivers of either of said companies, and which, on a hearing and final accounting had between the receivers of the said Atlantic and Pacific Railroad Company and the receivers of the said Pacific Railroad, in respect
75, 76 to said liens and payments, may be found to be due and owing to the receivers of the said Atlantic and Pacific Railroad Company.

77 And afterwards, to wit, at a regular term of the said circuit court of the United States begun and holden on the third Monday, the 18th day of September, 1876, the following motion to confirm sale was filed, to wit:

In the circuit court of the United States for the eastern district of Missouri.

GEORGE E. KETCHUM
vs.
THE PACIFIC RAILROAD AND OTHERS. } In chancery.

Now comes the above-named complainant by his solicitor and moves the court to confirm the report of sale made by Seymour D. Thompson, in the above entitled cause, under the order of this court, of the railroad and other property of the said Pacific Railroad, and the other property therein named.

JAS. O. BROADHEAD,
Sol. for Complainant.

And afterwards, at said term of said court last aforesaid, the following further proceedings were had in said cause on the 6th day of October, 1876, to wit:

GEORGE E. KETCHUM ET AL., COMPLAINANTS,
vs.
THE PACIFIC RAILROAD ET AL., DEFENDANTS.

78 Now at this day come the complainants by their solicitor and move the court to confirm the sale of the Pacific Railroad, and

its property and appurtenances, and the franchises of said railroad company, and the real estate and other property mentioned and described in the order of sale made by this court at its last term in this cause; and it appearing to the court, from the report of Seymour D. Tompsen, master, appointed to make such sale, that the order of this court authorizing and requiring the said Seymour D. Thompson to make said sale has in all respects been complied with, and that James Baker became the purchaser of said railroad, franchises, and property above mentioned and referred to, for the sum of three millions of dollars:

Now, therefore, it is ordered, adjudged, and decreed that the said sale be and the same is hereby confirmed, according to the conditions of the order of sale heretofore made by this court at its last term, and subject to the claim of the county of St. Louis to a prior lien thereon, for seven hundred thousand dollars, and interest thereon, as the same has been or may be established by this court, or by the Supreme Court of the United States in case of appeal.

79, 80 And afterwards, at said term of said court, the following further proceedings were had in said cause, on the 24th day of October, 1876, to wit:

GEORGE E. KETCHUM ET AL., COMPLAINANTS,
vs.
THE PACIFIC RAILROAD ET AL., DEFENDANTS.

Now come the complainants by their attorney, James O. Broadhead, esquire, and James Baker, esquire, and Seymour D. Thompson, esquire, master in chancery, and it appearing to the court that the property and franchises hereinafter described have been duly sold in accordance with the decree and order of this court heretofore made and rendered in this case, and that the conditions of said sale have in all respects been duly complied with by the said James Baker, the purchaser of said property, and that he is entitled to a deed therefor; and Seymour D. Thompson, esquire, the master in chancery, who made said sale, having submitted to the court a deed in words and figures as follows, to wit:

81, 82 UNITED STATES OF AMERICA,
Eastern District of Missouri:

This indenture, made in triplicate this twenty-fourth day of October, A. D. 1876, by and between Seymour D. Thompson, esquire, a master in chancery of the United States circuit court for the eastern district of Missouri, duly appointed and qualified as such, party of the first part, and James Baker, esquire, party of the second part, witnesseth:

That whereas the Pacific Railroad, a corporation chartered and existing under and by virtue of the laws of the State of Missouri, did, on the 10th day of July, A. D. 1875, make and deliver to Henry F. Vail and James D. Fish, trustees, its mortgage or deed of trust of that date, by which the said Pacific Railroad did convey and mortgage to the said Vail and Fish all the property, real and personal, rights, interests, and franchises, of the said Pacific Railroad to secure certain bonds therein mentioned and described as set forth in the said mortgage, and which is hereinafter more particularly described;

And whereas George E. Ketchum, a holder of certain of the bonds secured by said mortgage, did, on the eleventh day of November, A. D. 1875, exhibit his bill of complaint in the circuit court of the United States in and for the district aforesaid, praying that the equity of re-

demption in and to the property, interests, and franchises embraced in said mortgage or deed of trust be forever barred and foreclosed, and that said property, interests, and franchises be sold to enforce the lien of the same and to satisfy the debt thereby secured;

And whereas such proceedings were had under the said bill of complaint in said court that, at an adjourned term thereof, and on the 6th day of June, A. D. 1876, a decree was entered thereunder, the name and style of the said cause being "George E. Ketchum et al., complainants, against The Pacific Railroad et al., defendants, No. 703, in equity"; that the said Pacific Railroad should stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to the said mortgaged premises, property, and franchises, and that the Pacific Railway and property, together with the franchises and appurtenances of the said railway company, as in said deed of trust or mortgage, dated July 10, 1875, is described, should be sold at public auction by the undersigned, Seymour D. Thompson, master in chancery of said court, to pay and satisfy the amounts due by said Pacific Railroad upon said bonds and any other indebtedness which the court might order to be paid out of the proceeds of said sale, together with the costs of said suit and of sale, including the services of said trustees, and their solicitors' and attorneys' fees, in and about the management of said trust, as might thereafter be ordered by the court; and which decree further provided that, upon said sale, the said master should execute a certificate stating such sale and setting out the terms and conditions thereof, and that he should report said sale and the terms and conditions thereof immediately after said sale to the court; and that, upon the terms of such sale being complied with, and the sale approved and confirmed by the court, said master should be, and he was by said decree authorized and directed, to execute and deliver to the purchaser or purchasers of said property a good and sufficient deed or deeds for the same;

And whereas it was further provided in said decree that, upon the sale of the said road, property, and franchises the undersigned, Seymour D. Thompson, master, should require the payment by the purchaser of the sum of at least two hundred thousand dollars in cash, or the delivery to him of a good and sufficient bond, with sureties to be by him approved, for the payment of such sum of two hundred thousand dollars when and as soon as thereto required by the court;

And whereas it was further ordered and decreed that the terms and conditions of said sale should be the payment of said sum of two hundred thousand dollars cash, or the execution and delivery of the bond thereinbefore specified, on the delivery of the certificate of sale by said master, and that the balance of the sum bid should, unless the purchaser were a bondholder or should represent bondholders, be paid in cash at the confirmation of said sale, should said sale be confirmed; and if said purchaser should be a bondholder, or represent bona fide bondholders, then, and in that event, should said sale be confirmed, that he should pay, or cause to be paid, in cash, said sum of two hundred thousand dollars, and also the pro rata portion from the proceeds of such sale, which might be by the said court then found due to the other bona fide bondholders, and that the balance, after such cash payment, might be paid in bonds bona fide owned or represented by him, the court expressly reserving for future consideration all questions as to the rights, priorities, and interests of all parties claiming any interest herein by way of bonds or otherwise;

And whereas it was further ordered in said decree that the undersigned master in chancery should designate the time of making such

sale, and should advertise the same, together with a description of the property and franchises to be sold, by publication showing the time, terms, and place of sale, and the property and franchises to be sold, to be inserted in the St. Louis Globe-Democrat, published in the city of St. Louis, Missouri; in the Evening Post, published in the city of New York, and in the Boston Journal, published in the city of Boston, for the period of sixty days in each of the said newspapers—the same to be inserted in each of said newspapers once a week during the first three weeks of said period, three times a week during the second three weeks of said period, and once every secular day during the remaining portion of said period of sixty days, the last insertion to be at least two weeks before the day of such sale;

And whereas it was further ordered, adjudged, and decreed in said decree that all the premises, property, and franchises covered by and embraced in the said mortgage sued on, viz, the mortgage dated July 10th, 1875, should be sold in a body and not separately, so that the purchaser or purchasers at said sale should acquire the whole of the property, premises, and franchises embraced in said last-named mortgage, subject to all prior mortgages;

And whereas it was further ordered, adjudged, and decreed in said decree that, in case said road, property, and franchise should be purchased by bondholders, or by trustees for bondholders, then, at any time within sixty days after said sale, any bona fide holder or holders of said third-mortgage bonds, secured by the mortgage sued on in said cause, should be allowed to become associated with said original purchaser or purchasers in the property purchased in the proportion that the bonds so held by him or them should bear to the whole number of bonds issued upon the same terms and conditions, with the same rights, subject to the same burdens, and under the same scheme as might be provided for or agreed upon by said original purchaser or purchasers for the purchasing and managing the property purchased, or for creating a corporation to which said property might be conveyed; provided that at the time of his election to share in said purchase he should pay his proportion of the money and expenses paid by the original purchaser;

And whereas it was further ordered, adjudged, and decreed that nothing in said decree contained should be construed to prejudice in any manner the claim of the county of St. Louis to a lien on the property and franchises of the said Pacific Railroad, alleged by the said county to exist, as fully appeared by the amended petition in said cause filed by the said county, for securing the payment of a certain debt of the said Pacific Railroad to said county for the sum of seven hundred thousand dollars and interest thereon, and alleged and claimed by the said county of St. Louis to be a prior lien therefor over all other incumbrances upon said property and franchises, the question of the existence and priority of said lien to be thereafter determined by the court, if not otherwise satisfactorily adjusted;

And whereas it was further ordered and decreed in said decree that nothing therein contained, or proceedings had in said cause, should in any manner affect the rights of the Boonville Branch Railroad, otherwise known as the Osage Valley and Southern Kansas Railroad Company, Boonville Extension, or its rights to rent therefor;

And whereas it was further ordered, adjudged, and decreed in said decree that any party purchasing under said decree should, in addition to the two hundred thousand dollars provided to be paid as above, pay in cash such further sum, not exceeding two hundred thousand dollars, as and when this court might require and direct to be paid, for the pur-

pose of satisfying any statutory, equitable, or other lien claims that had been or might be filed in said cause, or in the case of Calvin Littlefield v. The Atlantic and Pacific Railroad Company and others, pending in said court, and which had been or might thereafter be directed by the court to be paid by the receivers of either of said companies, and which, on a hearing and final accounting had between the receivers of the said Atlantic and Pacific Railroad Company and the receivers of the Pacific Railroad, in respect to said liens and payments, might be found to be due and owing to the receivers of the said Atlantic and Pacific Railroad Company;

And whereas I, the undersigned master in chancery, did, in pursuance of the terms of said decree, designate Wednesday, the sixth day of September, A. D. 1876, between the hours of eight o'clock a. m. and four o'clock p. m., as the time of making such sale, and did advertise the same, together with a description of the property and franchises to be sold, by publication, showing the time, terms, and place of sale and the property and franchises to be sold, which advertisement was inserted in the St. Louis Globe-Democrat, published in the city of St. Louis, Missouri; in the Evening Post, published in the city of New York, and in the Boston Journal, published in the city of Boston, for the period of sixty days in each of said newspapers, beginning on Thursday, the twenty-second day of June, A. D. 1876, and ending on Tuesday, the twenty-second day of August, A. D. 1876, the said advertisement having been inserted in each of said papers once a week during the first three weeks of said period, three times a week during the second three weeks of said period, and once every secular day during the remaining portion of said period of sixty days, the last insertion having been at least two weeks before the day of such sale;

And whereas proof of publication of the said advertisement, as required by said decree, was duly made and lodged with the undersigned in conformity to the statute of the State of Missouri in such cases made and provided, which proof was duly filed by the undersigned master in chancery among the papers in said cause in the office of the clerk of said court, as an exhibit to his report of said sale, as hereinafter named;

And whereas I, the undersigned master in chancery, did, on the sixth day of September, A. D. 1876, at the hour of twelve o'clock meridian, at the east door of the court-house, in the city of St. Louis, Missouri, after reading to the persons there assembled a duly-certified copy of the decree aforesaid, and also a copy of the said advertisement, expose to sale, at public auction, in a body and not separately, and subject to all prior liens and mortgages, as provided for in said decree, all the property, rights, interests, and franchises of the said Pacific Railroad [of Missouri] described in the said mortgage or deed of trust, dated July 10, 1875, made by said Pacific Railroad to Henry F. Vail and James D. Fish, trustees, and hereinafter more particularly described;

And whereas James Baker, the party of the second part hereinbefore named, did then and there bid for the said property, franchises, and estate, subject to all prior liens and mortgages, as provided in said decree, and subject also to all the terms, limitations, and conditions named in said decree, the sum of three million dollars [$3,000,000], and he being the highest and best bidder, and no other person, after full and fair notice given, being willing to offer any advance upon said bid, the said property, franchises, and estate were then and there sold to him, the said James Baker, subject to all prior liens and mortgages, as provided in said decree, and subject also to all the terms, limitations, and conditions named in said decree and hereinbefore set forth;

And whereas the said James Baker did thereupon sign an acknowledgment of the fact and amount of his said bid, and did then and there execute and deliver to the undersigned master in chancery a bond to secure the payment of the sum of two hundred thousand dollars, as provided for in the said decree, and the said James Baker and the sureties whose names appear on said bond did acknowledge their signatures and seals to the same in the presence of the undersigned, and the said bond was by the undersigned found to be a good and sufficient bond to secure the sum in question, and was therefore approved by the undersigned;

And whereas afterwards, to wit, on the 15th day of September, A. D. 1876, I, the undersigned master in chancery, did lodge in the office of the clerk of said court my report of said sale, addressed to the judges of the said court, and setting forth fully my doings under the said decree;

And whereas afterwards, to wit, on the seventh day of October, A. D. 1876, a decree was entered in the said cause reciting that the said sale was in all respects regular and in accordance with the terms and requirements of said decree and ordering that the same be confirmed;

And whereas the said James Baker, party of the second part, did, on the 20th day of October, A. D. 1876, deliver to the undersigned, in part payment of his said purchase, three thousand nine hundred and forty-eight [3948] bonds of the Pacific Railroad, known as third-mortgage bonds, for the payment of one thousand dollars [$1,000] each, dated July 10th, 1875, signed by Sam'l Hays, president of the Pacific Railroad, and countersigned by J. L. Dearborn, treasurer of the said corporation, and sealed with its corporate seal; and did, on the 23d day of October, A. D. 1876, pay into the registry of the court the sum of fifty thousand dollars [$50,000] in cash, and did on the same day enter into a bond, with sureties then and there by the court approved, to pay such further sum, not exceeding five hundred and fifty thousand dollars [$550,000], whenever required by the court, and in such installments as the court should require;

And whereas such payments of bonds and of money, and the giving of such bond, were accepted by the court as a compliance on the part of the said James Baker, party of the second part, with the terms and conditions of said sale, it having been adjudged by the court that he purchased the said property, franchises, and estate as the representative of bona fide bondholders;

And whereas, on the twenty-third day of October, A. D. 1876, an order was entered in said cause requiring the undersigned master in chancery to make and deliver to the said James Baker, party of the second part, his deed of conveyance of the property, franchises, and estate embraced in said mortgage, decree and sale, the court having first approved said deed in substance and in form:

Now, therefore, in consideration of the premises and by virtue of the powers vested in me by my said office of master in chancery of said court and by the decrees and orders aforesaid, and in obedience to the said decrees and orders, and in order to give effect to the same, I, the said party of the first part, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey unto said James Baker, party of the second part, his heirs and assigns forever, subject to the terms, limitations, and restrictions enumerated in said decree of June sixth, 1876, all the right, title, interest, and estate of the Pacific Railroad in and to the property and franchises embraced in the deed of mortgage bearing date of July the tenth, A. D. 1875, as aforesaid, and

also as described in said decree of foreclosure and sale and in the advertisements of said sale as aforesaid, as follows, that is to say:

1. All and singular the entire line of the Pacific Railroad [of Missouri], two hundred and eighty-three miles in length, extending from the depot at Seventh street, in the city of St. Louis, State of Missouri, to the western boundary of said State at Kansas City, and passing through the counties of St. Louis, Franklin, Gasconade, Osage, Cole, Moniteau, Morgan, Cooper, Pettis, Johnson, Cass, and Jackson, in said State of Missouri, with its appurtenances, including, among other things, the track on Poplar street and the Levee, in the city of St. Louis, commonly known as the "Poplar Street Track," and including the real estate, depots, stations, machine shops, rolling stock, machinery, rights and interests and franchises of the said railroad company, subject to the liens of the two mortgages described in the said bill of complaint, severally executed by said Pacific Railroad, one of which was so executed to Murdock, Punnett and Clark, and the other of which was executed to Edwin D. Morgan and Joseph Seligman.

2. All and singular the following-described real estate in the cit of St. Louis, State of Missouri, viz: Four blocks of ground in the city of St. Louis, being city blocks, numbered four hundred and eighteen, four hundred and twenty-three, four hundred and twenty-eight, and four hundred and thirty-three, bounded east by Seventh street, south by Cerre street, west by Eleventh street, and north by Poplar street. Also, block number two hundred and thirteen of the city of St. Louis, bounded east by Twelfth street, south by Austin street, west by Fourteenth street, and north by Randolph street, saving and excepting therefrom lots 26, 29, 33, and 34, the north one-half of lot number 36, and part of lot number 25, embracing the southwest corner of said block sixty-six feet eight inches on Fourteenth street, by one hundred feet on Austin street.

Also, the following-described real estate in city block number four hundred and thirty-eight, viz:

Beginning at the northwest corner of Eleventh and Cerre streets, in the city of St. Louis, the southeast corner of said block; thence west along the north side of Cerre street one hundred and fifty-two feet and six inches, more or less, to an alley; thence north one hundred feet; thence east, parallel to Cerre street, one hundred and fifty-two feet and six inches, to Eleventh street; thence southwardly, on the line of Eleventh street, to the place of beginning.

Also the following, viz: Commencing at the southwest corner of city block number four hundred and thirty-eight, the northeast corner of Twelfth and Cerre streets; thence north one hundred and four feet and six inches; thence east one hundred and fifty two feet and six inches to an alley; thence south one hundred and four feet six inches to Cerre street; thence west one hundred and fifty-two feet six inches to Twelfth street, the place of beginning.

And also the following described tract or parcel of land, viz: Commencing at the northwest corner of city block number four hundred and thirty-nine, the southeast corner of Twelfth and Cerre streets; thence south one hundred and seventy-six feet, more or less, to the south line of property of the Pacific Railroad; thence eastwardly, along said south line, to the northeast corner of said block four hundred and thirty-nine; thence along the south line of Cerre street to the place of beginning; being the same property mentioned and described in said bill of complaint as covered by the mortgage executed to Lackland and Durkee, and said premises being conveyed subject to the lien of said last-mentioned mortgage.

3. All and singular the branch railroad of the said Pacific Railroad' constructed and operated and extending from a point on the main line at or near Kirkwood; thence to the termination of the said railroad at the Mississippi River at Carondelet or South St. Louis, with its appurtenances, including the depots, stations, machine shops, superstructures, and erections on the line of said branch railroad, or at Carondelet aforesaid, together with all the side-tracks and switches connected with said branch railroad, and also all the lands acquired and appropriated, or that may be acquired or appropriated, for depots, engine-houses, car-houses, station-houses, warehouses, machine-shops, or other superstructures and erections on the line of said branch railroad, or at Carondelet aforesaid; which said last-mentioned premises and property were so mortgaged, subject to the lien of a mortgage to Jesse Seligman and James Baker, described in the bill of complaint.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and all reversions, remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, and demand whatsoever, either in law or in equity, of the said Pacific Railroad, and of the said Vail and Fish, trustees, in and to the above-described premises, and their hereditaments and appurtenances, which the undersigned is, by virtue of the various decrees and orders hereinbefore enumerated, entitled to convey.

To have and to hold the same unto the said James Baker, party of the second part, his heirs and assigns, to his and their only proper use and benefit forever.

In witness whereof the party of the first part, as master in chancery of said court, has hereunto set his hand and seal the day and year first above written.

SEYMOUR D. THOMPSON, [SEAL.]
Master in Chancery of said Court.

83 And it further appearing to this court that the said deed is correct in form and substance, and that all the recitals in said deed contained are true and correct, now, therefore, it is ordered and decreed that the said Seymour D. Thompson, master in chancery, do execute, acknowledge, and deliver to the said James Baker a deed in triplicate, in tenor and form as submitted to the court and hereinbefore set forth, of the property and franchises, and upon the delivery of said deed the receivers heretofore appointed by the court in this case are authorized and directed to turn over the property to the said Baker, or his assigns, taking a proper inventory thereof and a receipt therefor.

84, 85 United States circuit court for the eastern district of Missouri, to wit

Be it remembered that at the March term, 1876, of the said court, and on the 20th day of April, 1876, in the case of George D. Ketchum et al. vs. The Pacific Railroad, The Atlantic and Pacific Railroad Company, et al., the same being case numbered 703, in equity, the following order appears of record, to wit:

And be it remembered that on the 20th day of April, A. D. 1876, the following entry appears of record in said cause:

GEORGE E. KETCHUM ET AL., COMPLAINANTS, *vs.* PACIFIC RAILROAD ET AL., DEFENDANTS. } 703.

Now comes the county of St. Louis, by Messrs. Hill & Bowman, its

solicitors, and by leave of court first had and obtained files its amended intervening petition herein.

86 The said amended intervening petition is in the words and figures following, to wit:

Circuit court of the United States, eastern district of Missouri. In equity.

GEORGE E. KETCHUM
vs.
THE PACIFIC RAILROAD AND ATLANTIC AND PACIFIC RAILROAD.

To the honorable the judges of the circuit court of the United States for the eastern district of Missouri, in the eighth circuit, sitting in equity:

First. The county of St. Louis, a municipal corporation of the State of Missouri, by leave of the court in this cause, comes and files this its intervening petition herein, and respectfully represents to this honorable court and shows that said county of St. Louis is a corporation duly organized under the laws of the State of Missouri, being a political subdivision of said State, with full powers under the laws thereof to sue and be sued, plead or be impleaded.

Second. That the Pacific Railroad is a corporation duly organized under the laws of the State of Missouri, and was at the several times hereinafter mentioned, and now is, the owner of the Pacific Railroad (of Missouri), extending from St. Louis, in said State, westwardly to Kansas City, on the western boundary line of said State.

Third. That on the 7th January, 1865, the legislature of the

87 State of Missouri passed an act entitled "An act authorizing the county of St. Louis to issue bonds," in words and figures as follows:

"Be it enacted by the general assembly of the State of Missouri, as follows:

"SECTION 1st. The county court of St. Louis County is hereby authorized to issue 700 county bonds of the denomination of one thousand dollars each, having twenty years to run, and bearing interest at the rate of seven per cent. per annum, payable semi-annually, the principal and interest payable in the city of New York, and loan said bonds to the Pacific Railroad Company for the completion of said road; said bonds to be issued under such conditions as may be agreed upon between said county court and the board of directors of the Pacific Railroad Company, such conditions to be binding on the parties, but shall not impair or affect the validity of bonds after they are issued.

"SECTION 2nd. The fund commissioner of the Pacific Railroad, or such person as may at any time thereafter have the custody of the funds of said railroad company, shall, every month after said bonds are issued, pay into the county treasury of St. Louis County, out of the earnings of said Pacific Railroad, $4,000, and $1,000 additional in each month of December, to meet the interest on the said 700 bonds; said payments to continue until said bonds are paid off by the Pacific Railroad." "This act to take effect and be in force from and after its passage."

Fourth. That thereafterward, on the 18th January, 1865, the following order was adopted by the county court of St. Louis County, namely:

"The provisions of an act of the general assembly of the State entitled 'An act authorizing the county of St. Louis to issue bonds,' approved January 7, 1865, is hereby by the county of St. Louis accepted;
88 and upon a passage of a resolution of the board of directors of the Pacific Railroad binding them likewise to the provisions of said act, an issue of the bonds of the county to the amount of 700 each, of the denomination of $1,000, having twenty years to run, and bearing interest at the rate of seven per cent. per annum, payable in the city of New York semi-annually, is hereby ordered, which are to be delivered to and by the county to the Pacific Railroad for the completion of said road; and the Pacific Railroad is likewise required, by the action of its board and its authorities, to assume the prompt payment of said bonds at their maturity, so that the same may constitute a legal indebtedness on the part of said Pacific Railroad to the county of St. Louis for the bonds hereby ordered to be issued and loaned. The said bonds are to be sold upon such terms as this court, or its presiding officer, may agree upon."

Fifth. And thereafterward, at a meeting of the board of directors of the Pacific Railroad, held on January 19, 1865, the following resolution was adopted:

"Resolved, That the board of directors of the Pacific Railroad unanimously accept of the terms, provisions, and obligations set forth and contained in an act of the general assembly of the State of Missouri entitled 'An act authorizing the county of St. Louis to issue bonds,' approved January 7, 1865, to be observed and faithfully performed by this company, and that the president be and is hereby instructed to execute an agreement under the seal of the company, obligating the said company to promptly pay at maturity the said bonds authorized to be issued by said act.

"Resolved, further, That this company accept of the terms and provisions of an order of said county court now here present and certified by the clerk of said court under its seal, and hereby obligates the company to an observance and faithful performance of all the provisions contained therein."

89 And your orator avers and says that the order of said county court, referred to in the above-mentioned resolution of January 19, 1865, was a certified copy of the order of said county court made January 18, 1865; that the same had been, by the clerk of said court, certified and delivered on said last-mentioned day to the board of directors of said Pacific Railroad, in like form and manner as above set forth.

Sixth. And your orator shows that thereafterward, on the 20th January, 1865, a copy of the resolution of the board of directors of the Pacific Railroad, adopted 19th January, 1865, as above set forth, was filed in said St. Louis County court.

Seventh. And that thereafterward, on February 3d, 1865, the said court made the following order of and concerning the premises, namely: "That nothing further is needed to bind the Pacific Railroad in the matter of the loan of seven hundred of the bonds of the county to said company for the completion of said road; the resolution of the company of the 19th inst. obligates it to an observance and faithful performance of the order of the court of the 18th inst., for the prompt payment of said bonds at their maturity."

And thereafterwards there was executed and delivered by the county of St. Louis its bonds of like description, as set forth, 700 bonds of $1,000 each, which said bonds were received by said Pacific Railroad in amounts

and dates as follows: 100 bonds February 20, 1865; 200 bonds March 7, 1865; 400 bonds May 6, 1865; which said bonds were afterwards sold by said Pacific Railroad, and the proceeds realized therefrom used in the completion of said road.

Eighth. Your orator further shows and says that on the 10th day of January, A. D. 1865, the president of the Pacific Railroad, for and on behalf of the company, presented to the county court of St. Louis
90 County the written opinion of the law officer of the corporation, Geo. E. Leighton, esq., an attorney-at-law, in words and figures as follows:

ST. LOUIS, *Jan.* 10, 1865.

COL. GEO. R. TAYLOR, *President Pacific Railroad:*

DEAR SIR: In reply to your communication of yesterday, touching the construction and effect of the 2d section of the act approved Jan. , 1865, I have to say:

The fund commissioner is a public officer, created by the act of Feb. 10, 1864. His position and duties, as defined by that act, are in general terms, those of a general trustee or receiver, holding, with the assent of the company (as expressed by the acceptance of the act), the earnings of the company upon certain expressed trusts, among which are paying expenses of operating, etc., the road, paying interest and principal of loan under that act, and paying interest upon and purchasing State bonds. It is in the last of these only that the State, as cestui que trust under the relations so established, has an interest which could be affected by legislation.

The 1st section of the present act authorizes the county court to loan, etc., under such conditions as may be agreed upon.

Although not mentioned in express terms, the act presupposes, or rather anticipates, an agreement to the effect that the money for the payment of interest upon these bonds shall be furnished the county out of the earnings of the company.

But as such an agreement could not be carried into effect, for, under the act of February 10, 1864, such earnings are not within the control of the company, but are in the hands of the fund commissioner (as trustee) for the benefit of the State as a cestui que trust, the 2d section is enacted for the purpose of giving effect to such agreement, and makes it the duty of the fund commissioner to pay out of the earnings of the road certain sums monthly.
91 If the act should be accepted by the company, and the county court should make the loan authorized, the act would be binding upon all the parties in favor of the county court, to wit, the company, the fund commissioner, and the State; and neither could object to its execution.

An agreement executed by the company, expressing its assent to such appropriation of the earnings of the road, would then, in my opinion, create in favor of the county an equitable lien or charge upon the earnings, pro tanto.

The direct authorization of such an appropriation of the earnings, or rather the direction to the fund commissioner (the trustee) to pay the monthly appropriation out of funds to the benefit of which it (the State) is entitled, is unquestionably, in my opinion, a waiver or postponement of the interest of the State as cestui que trust in favor of the county, to the extent and for the purposes specified in the act.

The act admits of no other construction. The first section of the act which authorizes the loan is enacted by the State purely in its legisla-

tive capacity. The second is, in effect, a partial release of its interest, for the State can have no legal control over this fund except as a cestui que trust, under the relations heretofore established, and then only over its interest. In this respect it occupies no higher relation than an individual would, holding the same claims.

By directing therefor, with the assent of the company, a different appropriation of the funds to which it was before the passage of the act entitled, it postpones or waives its own claim to that extent in favor of the party authorized by this act to receive, viz, the county of St. Louis.

The claim of the county upon the earnings of the road under this act could be easily enforced. The fund commissioner is a public officer, and where his duty is well defined and, as under the second section of this act, purely ministerial, he may, in case of a failure to pay over
92 the amount monthly as directed by the act, be proceeded against by mandamus, and compelled to perform the duty enjoined upon him by law.

Very respectfully, your obedient servant,

GEO. E. LEIGHTON.

That the said opinion, to the effect that the act of 1865 and its acceptance by the company would constitute and create a lien, was presented by the company for the purpose of inducing the county of St. Louis to loan to said company the said sum of seven hundred thousand dollars, and relying upon said representation, and agreeing to the construction of the act of Jan. 7th, A. D. 1865, as to the creation of a lien in favor of the county, the said loan of seven hundred thousand dollars was made to said company.

Ninth. Your orator, intervening as aforesaid, further shows unto this honorable court that the fund commissioner of the Pacific Railroad was created by public laws of the State of Missouri, known as the act of February 10th, 1864, sections 5 and 6, and the act of 19th of November, 1857, sections 4, 5, and 7 of said act; and said fund commissioner was and is a State officer commanded and required to hold the custody of the moneys of the Pacific Railroad, and it was made the duty of said fund commissioner, as such State officer, to pay out of the earnings of the said railroad company the monthly interest stated, until the said seven hundred bonds were paid off by said Pacific Railroad.

Tenth. Your orator further says that at the time the said act of the general assembly of the State of Missouri, approved January 7th, 1865, was passed and took effect, the State of Missouri had a claim against said Pacific Railroad for bonds loaned said company by the State for about $8,000,000, on which the State claimed a statutory lien as
93 a first mortgage; and on the 31st of March, 1868, a public act of the State of Missouri was passed and approved to sell and compromise the claims of the State of Missouri against said Pacific Railroad for the sum of $5,000,000, to be paid to the State by said Pacific Railroad.

And by said act of 1868 it was further declared, in section 6, that in case of a sale of said road under the provisions of sections 1, 2, 3 and 4 of the said act of 1868, the State of Missouri should assume the payment of the principal and interest due on $700,000, in bonds issued by the county of St. Louis as a loan to the Pacific Railroad under said act of January 7th, 1865.

And by section 10 of said act of 1868 it was further declared as follows: "All bids and proposals for the purchase of said road shall assume, first, the payment of principal and interest, and to become due

on the $1,500,000 first mortgage bonds issued under the act of February 10, 1864; second, the principal and interest due on the $700,000 bonds, issued by the county of St. Louis to the Pacific Railroad Company, under the act of January 7, 1865," and other matters.

And the said Pacific Railroad, in accordance with the provisions of said act of 1868, compromised the debt of $8,000,000, and interest thereon, for $2,050,000, by paying the State $5,000,000, the Pacific Railroad assuming to pay the said statutory lien in favor of St. Louis County, for $700,000 principal, and $49,000 a year interest, as it existed under said act of 1865, all of which appears from the face of said acts of 31st March, 1868, and January 7th, 1865, which are public acts of the said State of Missouri, of which the mortgagees holding mortgages subsequent in date to the 31st day of March, 1868, have constructive notice, and are notified in law of the lien of the county of St. Louis therefor of that date.

Eleventh. And your orator further says that afterward, on the 29th day of June, 1872, a lease was made by and between "The
94 Pacific Railroad" aforesaid and the Atlantic and Pacific Railroad Company of the Pacific Railroad, its rolling stock, tracks, depots, fixtures, and appurtenances of every kind, and all its leased lines, for a period of 999 years, at certain rents and on certain conditions therein named, which lease was duly sealed, executed and delivered by the Pacific Railroad, signed by the president and secretary of each of said railroad companies, on the day of its date. And in the said lease it was recited that the said Atlantic and Pacific Railroad Company should pay, as and for annual rent on said lease, the interest accruing and to become due and payable from and after the date of said lease upon $7,000,000 six per cent. gold bonds issued by said party of the first part, dated August 1st, 1868; upon $3,000,000 of 7 per cent. currency bonds also issued by said party of the first part, dated July 1, 1871; upon $700,000, being the amount of certain bonds of the county of St. Louis, which were by said county loaned to the said party of the first part, and which it undertook and agreed to pay, and which are due and payable on the 1st February, 1885, with interest at the rate of seven per cent. per annum; all of which will more fully and at large appear by reference to said lease.

Twelfth. And said lease was duly executed by the respective parties, sealed, acknowledged, and recorded in the recorder's office of each county in the State of Missouri through which said Pacific Railroad runs, and every mortgagee, including the complainants, had full and constructive notice of the said statutory lien under the acts of January 7, 1865, and of March 31st, 1868, and they had further notice of the equitable lien of said county of St. Louis for the said $700,000 and interest thereon, and that such equitable lien had priority over all liens created after the 31st day of March, 1868, and priority over the lien of complainants.

And your orator further shows to this honorable court that the
95 said lien of the county of St. Louis is and has always been recognized to be a statutory lien, valid and existing under the said acts of 1865 and 1868, and also in the said lease of 1872.

Thirteenth. And your orator further shows that the said bonds for $700,000 loaned by said county of St. Louis to the Pacific Railroad in January, 1865, were sold by the Pacific Railroad, and the proceeds were applied by the Pacific Railroad to build bridges and repair the said railroad and depots, and the statutes of 1865 and 1868 gave notice of said equitable lien and statutory lien to all the world and to the trustees and mortgagees in this suit, and both as an equitable lien and as a statutory

lien it has precedence over all liens and mortgages made or executed subsequent to the 31st day of March, 1868, and has priority over the mortgage complainants seek to foreclose in this suit.

Fourteenth. Your orator further shows that, from and after the date of the execution and delivery of said 700 bonds of $1,000 each, the monthly installment of interest of $4,000 per month, including $1,000 additional for the month of December, so due and payable as aforesaid under the terms and conditions of said act of January 7, 1865, and the terms of said contract made pursuant thereto, were paid from time to time, up to and including the month of May, 1875, but that no payment has been made for the months of June, July, August, September, October, November, December, 1875, or for the months of January, February, and March, 1876, and that the amount of interest on said loan now due the county of St. Louis from said Pacific Railroad (except for the present month of April, 1876, and which is unpaid) amounts to $41,000.

Fifteenth. Your orator further shows that, by reason of the premises, there exists a statutory lien and charge under said acts of January 7, 1865, 1855, 1857 and 1868, and said lease and contracts made in pursuance thereof, and an equitable lien under the statute, of which public notice is given by the statutes to all the world, in favor of the
96 county of St. Louis, upon all the earnings of said Pacific Railroad, that the same is prior to all other liens upon said road of every kind and description whatsoever, and that the same is entitled to a preference of payment over all other charges and demands against said Pacific Railroad.

Sixteenth. The county of St. Louis, as intervenor, further shows that in this cause, on the 8th day of April, 1876, an order was made appointing Joseph L. Stephens, John H. Beach, and Oliver Garrison, citizens of Missouri, receivers of the Missouri Pacific Railroad in this cause; that by virtue of their office they have been since said last-mentioned date, and now are, in possession and operating the said Pacific Railroad, receiving and having custody of the funds of said Pacific Railroad Company. Wherefore, the intervenor prays that its said lien claimed for said interest so due as aforesaid, amounting as aforesaid to $41,000, and the said sum of $700,000 herein mentioned and claimed as being a lien statutory and equitable, may be established by this court; that said Pacific Railroad Company be required to answer this intervening petition; that cause may be shown, if cause there be, why the relief prayed for may not be granted; and this intervenor prays for an order that said receivers be required to pay this intervenor's claim out of the earnings of said Pacific Railroad in their possession as such receivers, and for such other and further relief as to equity and good conscience appertains, and as this court shall deem meet.

FRANK J. BOWMAN,
Solicitor for County Court of St. Louis County.
BRITTON A. HILL,
Of Counsel for County Court of St. Louis County.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

Charles F. Vogel, being duly sworn, doth depose and say that
97 he is deputy clerk of the St. Louis County court, that he has knowledge and information of the facts stated and set forth in the foregoing petition, and that the same are true.

CHARLES F. VOGEL.

Sworn and subscribed before me by said Chas. F. Vogel on the 20th day of April, 1876.

C. M. WARD,
U. S. Commissioner, Eastern District of Missouri.

(Which petition is endorsed as follows:) Amended intervening petition of St. Louis County. Filed April 20, 1876. M. M. Price, clerk.

Filed in my office January 23d, 1877.

SEYMOUR D. THOMPSON,
Master in Chancery.

I hereby acknowledge service of copy of this petition, April 21st, 1876.

O. GARRISON, *Receiver.*

And be it remembered, that thereafter, to wit, on the 10th day of May, A. D. 1876, the following order appears of record in said cause:

GEORGE E. KETCHUM ET AL., COMPLAINANTS,
vs. } 703.
PACIFIC RAILROAD ET AL., DEFENDANTS.

Now come the said parties, by their respective solicitors, and the motion heretofore filed in this cause to rescind an order made by
98 this court on the receivers herein to pay to the county of St. Louis the sum of forty-one thousand dollars having been heard and considered by the court, it is ordered that the same motion be and the same is overruled.

It is further ordered, that the order heretofore made in this cause, on the 3d day of April last, so far as the same relates to the payment by the receivers to the county of St. Louis of the amount of forty-one thousand dollars, claimed to be interest due to said county, be, and the same is so far modified as to empower said receivers to pay said $41,000 to said county, on the express condition that the said county shall refund the same when and as this court may hereafter order, if this court shall decide, on proper hearing had, that said county is not entitled to receive the same.

The court hereby reserves for further hearing the determination of the rights of all the parties to this cause, so far as the same relate to the demand of said county.

And be it remembered, that thereafter, to wit, on the 5th day of June, A. D. 1876, the following entry appears of record in said cause:

GEORGE E. KETCHUM ET AL., COMPLAINANTS,
vs. } 703.
PACIFIC RAILROAD ET AL., DEFENDANTS.

Now come the complainants, by their solicitors, and file their demurrer to the intervening petition of St. Louis County herein.

Which said demurrer is in words and figures following, to wit:

99, 100 *Demurrer of the complainants to the intervening petition of St. Louis County, filed in this case April 20th, 1876.*

GEORGE E. KETCHUM ET AL.
vs.
PACIFIC RAILROAD ET AL.

In the United States circuit court for the eastern district of Missouri.

These complainants, by protestation, not confessing, all or any of the matters and things in the said intervening petition contained to be true, in such manner and form as the same is therein set forth and alleged, do demur to the said intervening petition, and for cause of demurrer show that the said St. Louis County, the intervening petitioner, has not in and by its said bill or petition made or stated such a case as entitles it in a court of equity to any discovery against these complainants, or to any relief against them or either of them, or which entitles it to defend against the relief prayed for by the complainants in their bill of complaint, or which entitles the said St. Louis County to intervene in this case.

101, 102 Wherefore, and for divers other good causes of demurrer appearing in the said intervening petition, these complainants do demur thereto, and humbly demand the judgment of this court whether they shall be compelled to make any other or further answer to the said intervening petition, and ask for judgment against the said St. Louis County.

CLINE, JAMISON & DAY, AND
JAMES O. BROADHEAD,
Atty's for Complainants.

We hereby certify that in our opinion the above demurrer is well founded in point of law.

CLINE, JAMISON & DAY.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

C. K. Garrison, one of the complainants in the above case, makes oath and says that the foregoing demurrer is not interposed for delay.

C. K. GARRISON.

Subscribed and sworn to before me this 11th day of May, A. D. 1876.
[L. S.]
J. M. DEUEL,
U. S. Commissioner, S. D. N. Y.

103 And afterwards, to wit, on the 6th day of June, A. D. 1876, the following order appears of record in said cause:

GEORGE E. KETCHUM ET AL., COMPLAINANTS,
vs.
PACIFIC RAILROAD ET AL., DEFENDANTS. } 793.

By consent, it is ordered that the consideration of the lien claim of St. Louis County herein be continued until the next term of this court.

And be it remembered, that thereafter, to wit, on the 19th day of June, A. D. 1876, the following order appears of record in said cause:

GEORGE E. KETCHUM ET AL., COMPLAINANTS,
vs.
PACIFIC RAILROAD ET AL., DEFENDANTS. } 703.

On motion of J. N. Litton, attorney for parties holding third mortgage bonds, it is ordered that any party to the record in this case may, if such party desire, make answer to the intervening petition filed herein by St. Louis County, or may file a motion to compel St. Louis County to refund the forty-one thousand dollars heretofore ordered to be paid St. Louis County; and if any issue of fact shall be made by said answer or motion, then said petition, answer, or motion raising said issue shall be referred to S. D. Thompson for hearing, who shall report thereon the facts, and his conclusions on the facts, and the law arising on said
104 petition, answers, and motions, on or before the first day of September term next, and that the parties may file exceptions to said report within ten days after the filing of said report, and the service of notice of such filing upon the solicitor of St. Louis County and the solicitors of the parties in adverse interest.

And be it remembered, that thereafter, to wit, on the 23d day of September, A. D. 1876, the following order appears of record in said cause:

GEORGE E. KETCHUM ET AL., COMPLAINANTS,
vs.
PACIFIC RAILROAD ET AL., DEFENDANTS. } 703.

The court having examined the question of law arising upon the demurrer to the amended intervening petition of St. Louis County, and being fully advised in the premises, is of opinion that the law upon said demurrer is in favor of said intervenor, and it is ordered that said demurrer be, and the same is hereby overruled, and leave granted to complainants to file answer to said intervening petition.

105 And be it remembered, that thereafter, to wit, on the 4th day of October, 1876, the following order appears of record in said cause:

GEORGE E. KETCHUM ET AL., COMPLAINANTS,
vs.
PACIFIC RAILROAD ET AL., DEFENDANTS. } 703.

On motion of St. Louis County, by its solicitor, it is ordered that complainants file their answer to amended intervening petition of Saint Louis County within five days.

And be it remembered, that thereafter, to wit, on the 12th day of October, 1876, the following entries appear of record in said cause:

GEORGE E. KETCHUM ET AL., COMPLAINANTS,
vs.
PACIFIC RAILROAD ET AL., DEFENDANTS. } 703.

This day comes Saint Louis County, by its solicitor, Frank J. Bowman, esquire, and files motion to strike out answer to amended intervening petition of St. Louis County.

GEORGE E. KETCHUM ET AL., COMPLAINANTS.
vs.
PACIFIC RAILROAD ET AL., DEFENDANTS. } 703.

Ordered, that the receivers reserve from the funds now in their hands, or which may hereafter come into their hands, the sum of twenty-eight thousand dollars, being the amount claimed by the County of St. Louis as interest on a loan of seven hundred thousand dollars bonds
106 loaned the Pacific Railroad, for the months of April, May, June, July, August, September, and October, 1876, the same to be held subject to the further orders of this court.

And be it remembered, that thereafter, to wit, on the 25th day of October, A. D. 1876, the following entry appears of record in this cause:

GEORGE E. KETCHUM ET AL., COMPLAINANTS.
vs.
PACIFIC RAILROAD ET AL., DEFENDANTS. } 703.

This day come the respondents to the intervening petition of St. Louis County, and, on motion, leave is granted to amend their answer to said petition by inserting in the body of said answer the words "Jesse Seligman and James Baker, parties in interest," and changing the word "defendant" to "respondents," and correct the clerical error in the signature of "Thomas Pierce and James Seligman."

And be it remembered, that thereafter, to wit, on the 15th day of January, A. D. 1877, the following entry appears of record in said cause:

GEORGE E. KETCHUM ET AL., COMPLAINANTS.
vs.
PACIFIC RAILROAD ET AL., DEFENDANTS. } 703.

This day comes the Atlantic and Pacific Railroad Co. et al., by its solicitors, and, by leave of court, file their amended answer to the intervening petition of St. Louis County, and thereupon the said intervenor, by its solicitor, files demurrer to said amended answer, as also a motion to strike out said amended answer.

The said amended answer is in the words and figures following, to wit:

107 In the circuit court of the United States for the eastern district of Missouri. In equity.

GEORGE E. KETCHUM AND OTHERS
vs.
THE PACIFIC R. R. CO. AND THE ATLANTIC AND Pacific R. R. Co. and others. } No. 703.

Now come George E. Ketchum, James Seligman and Thomas W. Pierce, complainants herein, and the Atlantic & Pacific Railroad Company (which has guaranteed the payment of the principal and interest of the bonds secured by the mortgage being foreclosed in the above written case), and Uriel Murdoch and Luther C. Clark, James D. Fish, Henry F. Vail, Edwin D. Morgan, Jesse Seligman and James Baker, parties in interest herein, and file this their joint and several amended answer to the intervening petition filed herein by the county of St.

Louis on April 20th, 1876. And these respondents, now and at all times hereafter reserving unto themselves respectively all the benefit and advantage of exception which can or may be taken to the many errors, uncertainties and other imperfections in said intervening petition, for answer thereto or unto so much and such parts thereof as these defendants are advised it is material or necessary for them to make answer unto, for answering say:

108 Defendants admit that the Pacific Railroad corporation is the owner of the Pacific Railroad, subject, however, to the liens and rights of these respondents and others, as stated in the bill of the complaint filed herein.

Respondents further answering say, that they have no knowledge or information sufficient to form a belief as to whether, if said bonds were sold by the Pacific Railroad, the proceeds realized therefrom were used in the completion of said road, and therefore require proof thereof.

Respondents further answering say, that they have no knowledge or information sufficient to form a belief as to whether or not on the 10th day of January, 1865, or at any other time, the president of the Pacific Railroad ever presented to the county court of St. Louis County the said document, which is set out in the petition herein as the written opinion of George E. Leighton.

Respondents further answering, represent to the court, that the said document, purporting to be signed by George E. Leighton, is manifestly incomplete, in that the letter or communication to which it purports to be a reply is not attached thereto.

Respondents further answering say, that they are informed and believe that, when the said communication to which said letter purports to be a reply is made known to the court, it will appear that said letter relates solely to the rights of the railroad company and bondholders as against the State, and does not refer to the rights of the county in the premises at all.

Respondents further answering say, that they have no knowledge or information sufficient to form a belief as to whether said pretended opinion of George E. Leighton, or letter, was ever presented by the Pacific Railroad Company, either for the purpose of inducing the county of St. Louis to loan said company the sum of seven hundred thousand (700,000) dollars, or any other sum, or for any other purpose.

109 And respondents deny that said county court or said county of St. Louis relied upon said pretended representations, or agreed to the said pretended construction of the act of January 16th, 1865; or that the said pretended loan of seven hundred thousand (700,000) dollars of bonds was made to the company on the faith of any such representations, or agreement, or construction, or any such opinion or letter of said Leighton.

Respondents further answering say, that they are informed and believe, and charge the fact to be, that it was well understood and agreed by St. Louis County and by the county court of St. Louis County, at the time of said transaction with the Pacific Railroad, that said county has no lien or security whatever for its said pretended loans; and respondents are informed and believe, and charge the fact to be, that the law officer and legal adviser of the county court of St. Louis County, at the time of said transaction and before it was closed, gave the county court of said county an opinion to the effect that the county would have no lien or security whatever for its pretended loan, but that the debt would be an unsecured debt.

Respondents further answering say, that they are advised and believe,

and charge the fact to be, that St. Louis County did not have either a statutory or equitable lien or security for seven hundred thousand (700,000) dollars principal, or forty-nine thousand (49,000) dollars interest, or for any other sum, upon either the property of the Pacific Railroad, or its franchises or income.

Respondents further answering say, that the Pacific Railroad did not compromise the claim of the State against its property for the sum of five millions of dollars; but that, for a full release from the State of all claims and demands whatsoever, it did pay the sum of five millions of dollars in cash, in addition to other valuable considerations; but respondents say that in said last named transactions with the State, the Pacific Railroad did not assume to pay, or make any contract or agreement whatsoever in regard to, the pretended claim of St. Louis County
110 for seven hundred thousand (700,000) dollars principal, and forty-nine thousand (49,000) dollars interest; nor did said Pacific Railroad ever treat or consider said claims of St. Louis County as a lien of any kind upon its property, income, revenue, or franchises.

Respondents further answering say, that they have no knowledge or information sufficient to form a belief as to whether said alleged act of January 7, 1865, and March 31st, 1868, were public acts or not; but deny that the moregagees holding mortgages subsequent in date to the 31st day of March, 1868, had constructive notice, or were notified in law or equity of the pretended lien of the county of St. Louis; nor had or have they any actual knowledge of any such pretended lien, or of the facts on which said claim is based.

And respondents further answering say, that it is true that on the twenty-ninth day of June, 1872, the Pacific Railroad corporation made a lease to the Atlantic & Pacific Railroad, but deny that it was recited in said lease that said Atlantic & Pacific Railroad Company should pay as for annual rental, or on any account, the interest accruing upon seven hundred thousand (700,000) dollars; but do allege that it was stated in said lease, which was duly executed by the board of directors and the stockholders of the Pacific Railroad, that said claim of St. Louis County was unsecured and without lien. And respondents deny that they had any notice, actual or constructive, of said pretended statutory lien in favor of said county, or that they had constructive or actual notice of any equitable lien in favor of said county, or that said pretended equitable lien had priority over all or any liens created after the 31st day of March, 1868, or priority over the lien of the complainant herein. And respondents deny that it is true that said county had any lien, either at law or equity, on either the revenue, income, property or franchises of the Pacific Railroad, and deny that said pretended lien had any priority over the rights of any of these respondents whatever.

111 And your respondents further answering say, that it is not true that said pretended lien of St. Louis County has always or ever been recognized as a valid or existing lien, either in the acts of 1865 or 1868, or in the lease of 1872, but allege the fact to be the contrary; and that it has always been considered and recognized by the State of Missouri, the county of St. Louis, and the Pacific Railroad corporation, that said county of St. Louis had no lien whatever; and said county, State and railroad corporation represented to the purchasers buying under the mortgages represented by respondents herein (except the Atlantic & Pacific Railroad Company), that said county had no lien whatever.

Respondents further answering say, that they have no knowledge or information sufficient to form a belief as to whether the allegations in said petition are true in regard to the application by the Pacific Rail-

road of said bonds alleged to have been loaned by the county, or of the application of the proceeds by the Pacific Railroad.

Respondents further answering deny the repeated allegations in said petition, that a statutory or equitable lien or charge exists, either under the act of January 7th, 1865, or 1855, or 1857, or 1868, or under any other act, or under said lease, or under any contract made in pursuance thereof, or under any contract whatever; and they deny that public notice was given to all the world of the existence of any such lien; and they deny that, if such lien does exist, it is prior to all or any other liens upon said road of every kind or description, or that it is entitled to a preference of payment over all or any other charges and demands against said Pacific Railroad; on the contrary, they allege, if there is any such claim existing at law or equity in favor of the county of St. Louis, it is against the Pacific Railroad corporation alone, and is unsecured, and must be in equity postponed to all other charges and demands against said Pacific Railroad, especially those represented by these respondents.

112 And respondents further show that, when the said receivers were appointed, they did not receive any property of the Pacific Railroad corporation, except that covered by the third mortgage described herein; and that all the funds in the hands of said receivers have been earned by the operation of said road since they were appointed and took possession, and belong in equity to the holders of the bonds secured by said third mortgage.

Respondents further answering say, that they are advised and believe that said intervener, the county of St. Louis, is not entitled to the relief prayed for under said petition, or any other relief whatever in the premises.

Respondents further answering say, that the county of St. Louis is now in equity and good conscience estopped from setting up, as against these respondents and those whose interests they represent, any claim to lien on either the income, the property, or the franchises of the Pacific Railroad; that not only in January, 1865, but on many and different occasions ever since that time, the county of St. Louis has repeatedly stated to the public that it had no lien upon said road, its property, franchises or income; and that, on the faith of said representations, these complainants, and those whom they represent, have acquired rights in and to said property, franchises and income.

Your respondents further represent and show, that on January 7th, 1865, and for many years prior thereto, the county of St. Louis owned five thousand (5,000) shares of the capital stock of the Pacific Railroad corporation of one hundred (100) dollars each, and the city of St. Louis, within said county, owned six hundred and eighty-eight (688) shares of said capital stock of one hundred (100) dollars each, and this, when the entire number of shares composing the capital stock of the Pacific Railroad Company was only three thousand six hundred (3,600).

Respondents further show, that the loss by the Pacific Railroad Company of its property would have entailed a severe pecuniary loss

113 upon St. Louis County; that its action in loaning its credit to the Pacific Railroad without security and without lien was no more than many other and smaller stockholders and directors in said corporation were in the habit of doing, not only at that time, but before and since.

Respondents further answering say, that in July, 1868, for the purpose of purchasing from the State of Missouri its first mortgage upon the road, and relieving the road from said incumbrance, and for the

purpose of taking up fifteen hundred thousand (1,500,000) dollars of first-mortgage bonds, secured by lien on the road, from Dresden, west, known as the Dresden mortgage bonds, and for the payment of which the earnings of the entire road were pledged, the Pacific Railroad corporation, in which the county of St. Louis and the city of St. Louis were the two (2) largest stockholders, at that time executed a mortgage bearing date July 15th, 1868, wherein your respondents, Murdoch and Clark, were made trustees for the purpose of securing seven million (7,000,000) dollars of first mortgage bonds, to be thereafter negotiated, which purported to be secured by a first and only lien upon the property, income and revenue of the Pacific Railroad. Said Pacific Railroad, with the county of St. Louis as a stockholder therein, assenting and directing the board of directors of the said Pacific Railroad so to do, represented to the public, and to the persons who desired to and who did purchase said seven million (7,000,000) dollars of first mortgage bonds, the said mortgage bonds created a first, and, at that time, only lien on the property, franchises, and income of the Pacific Railroad; and, on the faith of these representations, authorized and endorsed by St. Louis County as a stockholder in the Pacific Railroad, said seven million (7,000,000) dollars of bonds were negotiated, the purchasers thereunder believing that they had the first, and at that time only lien on said property, franchises, and income.

Your respondents further answering say, that they are in-
114 formed, and believe and charge the fact to be, that while said county of St. Louis was a stockholder in the Pacific Railroad, it permitted and authorized the board of directors of said corporation to issue printed reports and other statements to the public, wherein it was stated and represented that said debt due said county was without lien and unsecured.

Respondents further state that, on the first day of July, 1871, the Pacific Railroad issued a mortgage which purported to be a second mortgage on the property, franchises, and income of the Pacific Railroad, and subject only to the first lien created by the mortgage just mentioned as the first mortgage.

And the said county of St. Louis, as respondents are informed and believe and charge the fact to be, was then, and has ever since continued to be, and is now, a large stockholder in the said Pacific Railroad, and knew, and did not object to the truth of these representations, but permitted the purchasers of said second mortgage bonds to buy on the faith of said representations; that they acquired a second lien upon all of said property; and your respondents, James Seligman and Edwin D. Morgan, were trustees in the last-mentioned mortgage, made to secure three million (3,000,000) dollars in bonds, which were sold and negotiated upon said representations that they were secured by a second lien upon the property, income, and franchises of the Pacific Railroad.

Respondents further answering say, that afterwards, to wit, on the 10th day of July, 1875, the Pacific Railroad, with the knowledge and without the dissent of St. Louis County, executed and delivered to Henry F. Vail and James D. Fish the mortgage being foreclosed in this case, which represented to the public that it constituted the third (3d) lien on all the rights, property, and franchises of the Pacific Railroad; said representations were made with the knowledge and without any dissent on the part of St. Louis County, or any notification to the purchasers of any claim on its part to any lien or incumbrance upon any of said property.

115 Your respondents, further answering, say that they are informed, and charge the fact to be, that at the time of the execution of said last mortgage, said St. Louis County was still a stockholder in the Pacific Railroad corporation.

Your respondents further state that they are informed, and believe and charge the fact to be, that each and all of said three (3) mortgages above described were duly recorded in each county in which the Pacific Railroad had property, as required by law.

Respondents further answering, say that afterwards, to wit, on the day of October, 1875, the county of St. Louis filed in the United States district court for the eastern district of Missouri a petition in bankruptcy, based solely upon the claim involved in its intervening petition herein, against said Pacific Railroad corporation; and in said petition said county, as respondents are advised and believe, stated and represented that its said claim was notably unsecured by any lien or incumbrance whatever upon the property of the Pacific Railroad; and respondents are advised by counsel, and respectfully suggest to the court, that said act of filing said petition constituted a waiver of said lien, if any existed.

Respondents further answering, say that afterwards, on the 15th day of November, 1875, the county of St. Louis filed in the case of Calvin Littlefield against The Atlantic & Pacific Railroad Company, then and now pending in this court, a petition to be made a party defendant therein, in which petition said county again represented that said claim was unsecured and without lien.

Respondents further answering, say they are advised, and believe and charge the fact to be, that on November 15th, 1875, in this suit, the county of St. Louis filed herein its petition to be made a party defendant, in which petition it again represented that its claim was unsecured.

Respondents further answering, say that they are informed, and believe and charge the fact to be, that it was not until March 20th,

116 1876, that St. Louis County ever claimed a lien upon either the property or income or franchises of the Pacific Railroad.

Respondents further answering, say they are advised, and believe and charge the fact to be, that many persons, who were on March 20th, 1876, bona fide holders for a valuable consideration of the third mortgage bonds of the Pacific Railroad, had purchased the same prior thereto, acting on the faith not only of the silence of St. Louis County for ten (10) years to assert any lien, but also on its positive assertion as contained in the first mortgage of the Pacific Railroad, and as contained in the said petition in bankruptcy against the Pacific Railroad, and as contained in the petition to be made a defendant in the Littlefield case and this suit—believing and relying upon said representations of St. Louis County that said county had no lien.

Wherefore your respondents suggest to the court, and insist, that in equity and good conscience the county of St. Louis is now estopped from setting up any such claim to lien or security prior to said third (3d) mortgage bonds.

Respondents further answering, suggest to the court that under the decree of sale made herein, to which St. Louis County has consented, if said county has any rights at all in the premises, it is not against the fund in the court or proceeds of the sale of the road, but is against the property in the hands of James Baker, who bought it subject to the rights of said county, if any exist, and who is not in his individual capacity a party to this suit, and who is a citizen of the same State with

the county of St. Louis, and over whom this court has no jurisdiction in a suit wherein St. Louis County is the sole complainant.

Respondents further answering, say that a large portion of the property in the hands of the court, covered by the third mortgage being foreclosed in this case, has been acquired subsequent to 1871, and respectfully insist that St. Louis County in no event would have any claim to the lien or income derived therefrom.

117 Respondents having fully answered in the premises, pray that the intervening petition of St. Louis County filed herein be dismissed, and that they recover their costs from St. Louis County.

ATLANTIC & PACIFIC RAILROAD CO.,
By J. N. LITTON, *Counsel.*
GEORGE E. KETCHUM,
By J. N. LITTON, *Solicitor.*
URIEL MURDOCH,
LUTHER C. CLARK,
[SEAL.] EDWIN D. MORGAN,
JESSE SELIGMAN,
JAMES BAKER, *all Trustees,*
By JAMES BAKER, *Solicitor,*
Per J. N. L.
THOS. W. PIERCE AND
JAS. SELIGMAN,
By J. N. LITTON, *Solicitor.*
JAMES D. FISH AND
HENRY F. VAIL,
By NOBLE & ORRICK, *their Solicitors,*
Per J. N. LITTON.

J. N. LITTON, *Counsel.*

Which answer is endorsed as follows: Amended answer of Atlantic & Pacific Railroad and others, to the amended intervening petition of St. Louis County. Filed January 15, 1877. M. M. Price, clerk.

Filed in my office January 23d, 1877.
SEYMOUR D. THOMPSON,
Master in Chancery.

118 And be it remembered, that thereafter, to wit, on the 20th day of January, A. D. 1877, the following order appears of record in said cause:

GEORGE E. KETCHUM ET AL., COMPLAINANTS,
vs. } 703.
PACIFIC RAILROAD ET AL., DEFENDANTS.

In reintervening petition of St. Louis County.

This day comes the county of St. Louis, by its solicitor, Frank J. Bowman, esquire, and also come the Atlantic and Pacific Railroad Company and others by their solicitors, and the court having considered the motion of said intervenor to strike out part of the amended answer of said Atlantic and Pacific Railroad et al., as also the demurrer to said answer, now orders that said motion and demurrer be, and the same are hereby, overruled; and on motion of said intervenor, by its solicitor, leave is granted to file reply to said answer within five days from this date.

It is further ordered that said matter be referred to Seymour D. Thompson, esquire, master in chancery, for examination and report upon the facts therein, and that all testimony be closed on or before March 1st, 1877.

And be it remembered, that thereafter, to wit, on the 6th day of February, 1877, the following order appears of record in said cause:

GEORGE E. KETCHUM ET AL., COMPLAINANTS,
vs.
PACIFIC RAILROAD ET AL., DEFENDANTS. } 703.

This day comes St. Louis County, by its solicitors, and on motion, it is ordered, that the time for filing replication to the answer of the Atlantic and Pacific Railroad, be extended to March
119 rules.

And be it remembered that thereafter, to wit, on the 8th day of February, 1877, the following entry appears of record in said cause:

GEORGE E. KETCHUM ET AL., COMPLAINANTS,
vs.
PACIFIC RAILROAD ET AL., DEFENDANTS. } 703.

This day comes the county of St. Louis, by its solicitor, and files replication to the answer of the Atlantic and Pacific Railroad Company et al.

And be it remembered that on February 8th, A. D. 1877, a reply was filed in said cause by the said intervenor, as follows:

GEORGE E. KETCHUM
vs.
PACIFIC RAILROAD ET ALS. } No. 703.

In the circuit court of the United States for the eastern district of Missouri. In equity.

Now comes the county of St. Louis and files this its reply, by leave of court first had and obtained, to the amended answer of Atlantic and Pacific Railroad et als., filed on January 15, 1877, and reserving unto itself all the benefit and advantage of exception which can or may be taken to the errors, uncertainties, or other imperfections in said
120 amended answer contained, for reply thereto or so much thereof as it is advised it is material or necessary to make reply thereto, says:

That said document signed by said George E. Leighton is not incomplete or imperfect, but is so complete and perfect of itself that no letter or other communication is necessary to be attached thereto to make the same complete and intelligible; and denies that said letter relates solely to the rights of the railroad company and bondholders as against the State; and says that it is apparent upon the face thereof that it does refer to the rights of the county of St. Louis, and is the expression of the opinion of the then law officer of the Pacific Railroad.

That under said act of 1865 the county of St. Louis was given a statutory lien upon said road, as claimed by and charged by your orator

in its said amended intervening petition; and complainant denies that it was well understood and agreed by St. Louis County and the county court of St. Louis County, at the time of said transaction with the Pacific Railroad, that said county had no lien; but, on the contrary, it was at the time well understood between the parties that a statutory lien was, by the act of 1865, secured to the county; and the letter of said Leighton was at the time delivered to the county court of said county and placed with the records in the clerk's office of said county by direction of the president of the company, as the expression, on the part of said company, of its then understanding of said agreement.

And complainant denies and says it is not true that the legal adviser of the county court of St. Louis County, at the time of said transaction and before it was closed, expressed an opinion to the effect that the county would have no lien or security whatever for its loan, but that the debt would be an unsecured debt as alleged by respondent in its said answer.

And complainant denies that it has ever been recognized by the State of Missouri, county of St. Louis, or Pacific Railroad corporation
121 that the county of St. Louis had no lien whatever; and denies that the county or State ever represented to purchasers buying under the mortgages that the county of St. Louis had no lien whatever, as respondents have alleged; but, on the contrary, says that prior to the institution of the foreclosure proceedings before this court, the right of the county of St. Louis to a lien for the recovery of each and every monthly installment of interest has never been denied or questioned; but, on the contrary, by all parties in interest been recognized, and prompt payment made as well by the Pacific Railroad, as also by the Atlantic and Pacific Railroad as lessee, until the month of May preceding the month of November, 1875, when receivers were appointed by this court; and payment was then only suspended upon the alleged ground that said company had no moneys with which to make said payments.

Complainant denies that it is in any manner estopped from setting up against the respondents and those whom it claims to represent, its right to lien on the income and franchises of the Pacific Railroad by reason of any or all the matters in said respondents' answer alleged and set forth.

Complainant denies that in January, 1865, the county of St. Louis stated to the public that it had no lien upon said road, its property, franchises, and income, or that it ever made such statement or allegation. And complainant says that by an act of the legislature entitled, "An act concerning the county of St. Louis," approved March 14, 1859, and an act entitled "An act amendatory of an act entitled, 'An act concerning the county of St. Louis,' approved March 14, 1859," which said last-mentioned act was approved January 16, 1860; and an act entitled "An act amendatory of and supplementary to an act entitled 'An act concerning the county of St. Louis,' approved March 14, 1859," which said last-mentioned act was approved March 14, 1863; as also by the provisions of an act entitled, "An act to reorganize the county
122 court of St. Louis County, and to create the office of presiding justice of said county, and to define the districts from which the presiding justice and associate justice shall be selected, and to change the term of office and time for electing said justices," which last-mentioned act was approved March 22, 1871, the county court of St. Louis County at the several times mentioned in respondents' answer had sole charge of all property belonging to said county, and were alone author-

ized to speak for and on behalf of the county in any matter touching or concerning the premises, but were not authorized by law to give or make any surrender of the right of the county to a lien on the Pacific Railroad, as created by said act of 1865; for that at the time of making said loan it had issued its bonds to the number of seven hundred, each of the denomination of one thousand dollars, and had set apart and appropriated to the payment of the interest thereon the said monthly installments of interest secured by said lien; and said bonds were, on the faith and credit of such security, issued and negotiated to bona fide holders, who had accepted the same upon the faith and credit of such security and have never consented to release said lien or any portion; and complainant says it was not in the power of said county court to release said lien without the consent of said bona fide bondholders.

And complainant says that it is not true that the county court of St. Louis has at any time stated or admitted that the county of St. Louis had no lien, or made any order to that effect, or in any manner released said lien or attempted so to do; and if any other person or party has assumed to make such declarations, they were wholly unauthorized so to do; any such allegations, if made, were void and of no binding force or effect to estop the county of St. Louis from asserting its legal and equitable right of lien against the Pacific Railroad.

123 Complainant says it has no knowledge or information sufficient to form a belief of and concerning the several matters set forth in respondents' answer, as to the purchasing from the State of Missouri its first mortgage on the road and the issuing of the subsequent mortgage for such purpose, and thereof require strict proof.

And complainant denies that the county of St. Louis ever authorized the board of directors of said Pacific Railroad to issue printed reports and other statements to the public, wherein it was stated and represented that said debts due said county were without lien and unsecured.

And complainant denies that at the time the so-called second mortgage was issued upon said Pacific Railroad, it was a stockholder therein as charged in respondents' answer; and denies that it is now a stockholder in said Pacific Railroad as alleged in said answer; and denies that the county of St. Louis knew and did not object to the truth of the representations made by the officers of the Pacific Railroad as to the rights of priority of the holders of the first and second mortgages; and denies that, as the holder of a statutory lien, it was in any manner required to object to or deny any of the representations made by the officers of the Pacific Railroad of or concerning the priority of its first or second mortgage bonds or any other bonds.

And complainant denies that the county of St. Louis had any knowledge of the execution or delivery of the so-called third mortgage to Henry F. Vail and James D. Fish, until long after the same was executed and bonds delivered thereunder; and denies that the same was done with the knowledge and without any dissent on the part of St. Louis County; and says that it was no part of its duty to give to purchasers of such bonds other or further notice of its statutory lien than was given by the public act creating the same, and by the public records of the county court, and by other means as fully disclosed and set forth in complainant's petition; and complainant denies that at the

124 time of the last mentioned mortgage it was a stockholder in the Pacific Railroad, as alleged.

And complainant denies that in its petition filed in October, 1875, in the United States district court, it stated or admitted it had no right to

a statutory lien for each and every monthly installment of interest as the same became due and payable as now claimed, and as set forth in complainant's bill of intervenor herein, or that it then admitted it had no encumbrance whatever on the property of the Pacific Railroad.

Complainant admits that its then counsel admitted and charged in said petition that the county of St. Louis was an unsecured creditor in the principal sum of $700,000, and that it now claims to be wholly unsecured as to that principal sum, but claims only a lien upon the property, franchise and earnings of said Pacific Railroad for accruing interest of $4,000 per month and $1,000 additional for the month of December. That as to whether its then counsel, at the time of filing said petition in said district court, was sufficiently advised of the rights and interest of the county in the premises as to correctly plead and set forth the same, it is not now sufficiently advised to positively aver; but is informed and believes that its counsel was not then sufficiently informed of all the facts in the premises to state the same with accuracy, and that shortly after the filing of said petition in the district court the same was voluntarily dismissed by the county of St. Louis as inaccurate in statement and insufficient in law; wherefore complainant says that the filing of said petition did not constitute in law a waiver of the statutory lien of said county.

And the complainant makes further reply and says that, as to the pleading of the county in the case of Calvin Littlefield *vs.* The Atlantic and Pacific Railroad Company, it did not therein disclaim its right to a statutory lien, as claimed in said intervening petition, but admits
125 that its then counsel stated, on presentment of a motion in that case to be made party, that he was not at the time sufficiently advised as to the extent of the right of the county to a lien claimed, and may have pleaded erroneously; but complainant says that it did not then, and has not at any time, charged, admitted or averred that it was not entitled to the statutory lien for accruing interest, as not claimed.

And complainant denies that any parties purchased third-mortgage bonds, or any other bonds, by reason of the silence of St. Louis County to assert any lien; or that so long as its interest was promptly paid it was under any obligations to assert the same, or to make any statement relating thereto, or to deny any statements made by the officers of the Pacific Railroad of or concerning the securities of the road; and denies that any parties purchased any third-mortgage bonds, or any other bonds, by reason of any of the allegations made by the attorney of the county of St. Louis in said petition in bankruptcy, or in said motion in said Littlefield case; and denies that, by reason of any of the several matters alleged in defendants' answer, it has been, either in law or equity, estopped from setting up and claiming a statutory lien upon the property of the Pacific Railroad.

And as, by virtue of the statute creating said lien, and the acceptance thereof by said company, $4,000 per month of the earnings of said Pacific Railroad were set apart to the use of the county of St. Louis, and were directed to be paid to the county by whosoever might receive the same, and as the receivers and officers of this court, while operating said road, have received the earnings, and have only paid to the county for a part and portion thereof—that is, to and including the month of March, 1875—complainant says there should be ordered and directed to be paid from said earnings, heretofore reserved and set apart by order of
126 this court for such purpose, the said sum of $4,000 per month for the remaining time, i. e., seven months; that said receivers operated said road and received its income, and that the prayer of complain-

ant's amended intervening petition should be granted, and for this complainant will ever pray.

FRANK J. BOWMAN,
Attorney for St. Louis County.

Which said reply is indorsed as follows: Reply of St. Louis County. Filed February 8, 1877. M. M. Price, clerk.

Filed in my office February 9, 1877.

SEYMOUR D. THOMPSON,
Master in Chancery.

And afterwards, on the 6th day of April, 1877, the master filed his report, in words and figures as follows, to wit:

127 *Intervening petition of Saint Louis County.*

In the circuit court of the United States for the eastern district of Missouri. In equity.

GEORGE E. KETCHUM AND OTHERS
vs.
THE PACIFIC RAILROAD, THE ATLANTIC AND Pacific Railroad Company, and others. } No. 703.

MASTER'S REPORT.

To the honorable the judges of said court:

Scope of order of reference.

This intervening petition was referred to the undersigned, one of the masters in chancery of this court, by an order of court dated the twentieth day of January, 1877, "for examination and report upon the facts therein."

The evidence transmitted.

The evidence submitted and herewith returned into court embraces, first, the testimony taken in my office, fifty-five pages, marked Exhibit A to Master's Report; secondly, a document containing the depositions of Francis A. Fogg, William H. Coffin, Darius R. Mangam and Andrew V. Stout, taken in New York, which document is marked Exhibit B to Master's Report; thirdly, twenty one documents offered and received in evidence and marked Exhibits 1 to 21 inclusive, Exhibit 20 including Sub-exhibits A to S inclusive.

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Pleadings, etc., in the principal case considered in evidence.

At the request of counsel for the respondents, I have considered as a part of the record herein the following designated pleadings and papers in the principal case (George E. Ketchum et al. v. The Pacific Railroad et al.), to wit:

1. The bill of complaint of George E. Ketchum, filed November eleventh, 1875;

2. The answer of the Pacific Railroad, filed February seventh, 1876;

3. The order of this court appointing receivers of the Pacific Railroad, dated April third, 1876;

4. The answer of Durkee and Lackland, filed June fifth, 1876;

5. The answer of Murdock, Clark, Morgan, Seligman and Baker, filed June fifth, 1876;

6. The decree of foreclosure made on June sixth, 1876;

7. The final order of the court directing Seymour D. Thompson, esq., master in chancery, to make a deed of the property covered by the third mortgage to James Baker, the purchaser at the foreclosure sale, which order is dated October fourth, 1876;

8. A copy of the deed of Seymour D. Thompson, esq., master in chancery, to the said James Baker, which copy by consent of counsel was received in lieu of an exemplification of the original, and is identified as Exhibit No. 21.

Scope of this report.

The order of reference seems to contemplate that I should make a finding of the facts in the nature of a special verdict; but that I should not express any opinion in the nature of a conclusion of law upon those facts. In making this finding, as well as in the admission of testimony, I have felt obliged to conform to the issues as made in the pleadings sent down to me, without reference to the question whether some of those issues may not be irrelevant to the case. After consultation with counsel it is thought best that this finding should be sufficiently full to contain a clear exposition, in historical order, of the facts bearing upon the transaction in controversy, and of those which are calculated to throw light upon the intention of the parties.

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I find the following facts:

St. Louis County.

First. That this intervenor, the County of St. Louis, is a municipal corporation and a political subdivision of the State of Missouri, duly organized under the laws of said State, with full power under the laws thereof to sue and be sued, plead and be impleaded.

The Pacific Railroad.

Second. That the Pacific Railroad is a corporation duly organized under the laws of the State of Missouri, and was, at the several times mentioned in this report, and until October twenty-fourth, 1876, the owner of the Pacific Railroad of Missouri, subject to the mortgages hereinafter set forth—a railroad extending from the city of St. Louis, in said State, westward to Kansas City on the western boundary of the State.

Charter of; State aid to.

Third. That the Pacific Railroad was chartered in the year 1849 by the legislature of the State of Missouri, with power to build a line of railway from the city of St. Louis to Kansas City on the western boundary of said State; that in the year 1851, and in subsequent years, the said railroad company received such aid from the State of Missouri that as early as the year 1855 the legislature had passed acts loaning the credit of the State to the company to aid and secure the completion of the road, in the shape of State bonds, the interest and principal of which the company had agreed to pay, to the extent of about $7,000,000.

"The Dresden bonds." Act of Feb. 10, 1864, § 1.

Fourth. That on the 10th day of February, 1864 (Laws of 1864, p. 50), the legislature passed an act the first section of which reads as follows: "The Pacific Railroad Company is hereby authorized to borrow money for the completion of the main road to Kansas City, and for this purpose may issue not more than one thousand five hundred bonds

130 of one thousand dollars each, bearing interest at the rate of not more than seven per centum per annum, with coupons attached, and having four, five, and six years to run, in equal proportions; said bonds to be secured by a first mortgage on the main line of the road west of Dresden; and as much of the proceeds of said bonds as may be necessary shall be applied to the completion of the road from its present terminus to Kansas City, and to no other purpose; said bonds shall only be negotiated or sold as the money is required for the payment of work done or under contract: Provided, however, That all of any one class of bonds may be sold at one time; and the State of Missouri, for this object, and to this amount and extent only, hereby relinquishes her first lien and mortgage and right of forfeiture upon said road west of Dresden, retaining, however, a second lien and mortgage thereon, such second lien and mortgage to become forthwith the first lien and mortgage in every respect, and as fully as now held by the State, upon the payment in full of principal and interest of the bonds authorized by this act. All the net profits of the road shall be applied to the extension and equipment thereof until completed as aforesaid, reserving, however, sufficient for the payment of the interest accruing semi-annually on said bonds actually sold; and after completion of the road any surplus over the accruing interest shall be applied to the purchase or payment of the bonds themselves: Provided, That no sale of the road west of Dresden as aforesaid, or any interest therein or therewith connected, on account of the non-payment of such interest or principal, shall be made, before notice in writing of such failure has been first given to the governor and secretary of state, and until twelve months shall have elapsed after such notice, before such sale: And it is further provided, That the State, through the governor or any agent appointed by the general assembly of the State, shall have the right to redeem said railroad from any sale under the provisions of this act by the bondholders or mortgagees, or buy in

"The Dresden bonds."

Act of February 10, 1864, § 1.

131 the same at any such sale; and upon the payment or tender of payment of the amount of such mortgage, with interest, by the State, all the rights and privileges of the Pacific Railroad Company in and to said railroad, depots, lands, rolling-stock, machine-shops, and other appurtenances shall be vested in the State, and the governor of the State shall take possession of the said road, without any suit or sale."

"The Dresden bonds." Act of Feb. 10, 1864, § 1.

Fifth. By the second section of said act, the office of fund commissioner was created, the material provisions being as follows:

The fund commissioner.

"The office of fund commissioner is hereby created, and shall continue until the bonds issued for the completion of the road, and the State bonds loaned to said railroad company, with interest thereon, are fully paid out of the earnings, or exchanged for the first-mortgage bonds of said road as hereinafter provided. * * * Within six days from the passage of this act, the directors of the Pacific Railroad Company shall cause said act to be submitted to the stock-

Act of Feb. 10, 1864, § 2.

holders thereof for acceptance, and if the same is accepted by a majority of the said stockholders in interest, the directors shall immediately certify such acceptance in writing to the Secretary of State.

That section 3 of said act provides as follows:

Ibid., § 3.

"The Pacific Railroad Company are hereby required to deliver to said fund commissioner, within a reasonable time after he shall be appointed and qualified, the bonds of the company hereby authorized to be issued, to the amount aforesaid, in bonds of one thousand dollars each, having four, five, and six years to run, in equal proportions, and bearing interest at a rate not exceeding seven per centum per annum, with coupons attached, payable semi-annually at the Bank of Commerce in the city of New York; whereupon, in order to give validity to such bonds, the State relinquishes to that extent, and for that object solely, as aforesaid, her first lien and mortgage upon said road west

Partial relinquishment of State's lien.

132 of Dresden, as aforesaid. * * * All gross earnings of said road, from all sources, shall be paid in daily to said fund commissioner, and all other sources of revenue, belonging to or connected with said railroad, shall be under his control, and be taken into his possession as they arise, and be deposited daily in the institution or bank aforesaid."

Powers of fund commissioner.

That by section 4 of said act the duties of said fund commissioner are further described as follows:

His duties.

"Said fund commissioner shall, out of all moneys arising from the sale of bonds, as aforesaid, upon proper vouchers, pay for the construction of the extension and equipment of said road, as aforesaid; and out of all other moneys derived from other sources, as before designated, in his hands and under his control, upon proper vouchers and receipts, he shall pay for the operating of the road; the payment for said construction and equipment shall be made upon the vouchers of the chief engineer of said road, approved and countersigned by the president, specifying in proper detail the amounts and character thereof; and the payment of operating the road shall be made upon the vouchers and certificates of the superintendent of the road, approved by the president and chief engineer."

That, by section 7 of said act, it is made the duty of the said fund commissioner "to apply the net earnings of the road, after paying the expenses of his salary, first, as provided in section one; second, to the payment of interest as the same shall become due and payable on the first-mortgage bonds issued and exchanged, as provided in section six; and next, not to exceed six per centum dividend on the preferred stock, as provided in section eight; and the surplus, if any, to the purchase of the outstanding State bonds, with interest coupons thereon, at the best market rates."

Sixth. That in pursuance of the authority so granted the

"The Dresden mortgage."

Pacific Railroad, by a deed* dated April first, 1865, mortgaged all that portion of its road extending from Dresden, in the county of Pettis, to Kansas City, on the west-

133 ern boundary of the State of Missouri; which mortgage purported to be a first mortgage on that por-

* Exhibit 11 to master's record.

tion of the road, made to secure bonds to the amount of $1,500,000, bearing interest at the rate of seven per cent. per annum, one-third of said bonds maturing in four years, one-third in five years, and one third in six years, respectively, from the first day of April, 1864, the date of the said mortgage.

Office of fund commissioner in existence in 1865.

Seventh. That the office of fund commissioner created by this act was in existence, and that said officer was in custody of the earnings the Pacific Railroad on the seventh day of January, 1865, the date of the passage of the act authorizing the loan of the bonds by the county of St. Louis here in controversy, and also on the eighteenth and nineteenth days of January, 1865, the date of the order of the county court of St. Louis County, authorizing the loan of said bonds, and of the resolution of the board of directors of the Pacific Railroad accepting said loan under the terms and conditions thereof; which statute, order, and resolution, respectively, are hereinafter recited. *

* The office was abolished by the act of March 31, 1868, § 12.

Stock of St. Louis County city, and tax-payers in Pacific Railroad.

Eighth. That on the thirty-first day of December, 1855, the county of St. Louis subscribed and paid for 5,000 shares of the capital stock of the Pacific Railroad, for which it paid the par value, namely, $100 per share; that the county continued to own stock and to be a stockholder in the Pacific Railroad until the twentieth day of November, 1869, when it disposed of the same to Hudson E. Bridge for $250,000. That on the first day of December, 1854, the city of St. Louis subscribed for five thousand shares of the capital stock of said Pacific Railroad, representing $500,000, on which there was a stock dividend of five hundred and seventy (570) shares; that on the twelfth day of April, 1856, three hundred (300) shares more of said stock were issued to said city of St. Louis, making an aggregate of 5,870 shares of $100 each, representing in all $587,000; that on the thirty-first day of January, 1870, the said city of St. Louis transferred this stock to Joseph Brown and William Taussig; that in the early part of the year 1857, or
134 thereabouts, the county of St. Louis, on behalf of its tax-payers, subscribed for 12,000 shares more of said stock, representing in the aggregate the sum of $1,200,000; that on May thirty first, 1865, there remained unissued of this stock 6,795 shares, and that there still remain unissued of the said stock 2,000 shares, representing the par value of $200,000. That, by an act of the legislature passed March 14th, 1859 (section 25), the board of commissioners for St. Louis County were required to cast the vote of the stock of said county for directors of the Pacific Railroad at the times fixed for the election of such directors, but were prohibited from taking into account or assuming to represent the shares of stock of the Pacific Railroad, for which the county court subscribed on behalf of said county in the year 1854, "for which the tax-payers have paid by a direct tax, and for which such tax-payers are entitled to certificates on presentment of their railroad tax receipts"; that the officers of the Pacific Railroad, in pursuance of the said act of the legislature, have refused to permit the county of St. Louis to vote or represent at meetings of stockholders

Voting said stock.

any of the stock which belongs to citizens as tax-payers of the county; and it is admitted that the said stock never was represented by the county court, and that under the above act the county court had no authority to represent it. That in the fall and winter of 1872, or the spring of 1873, this stock acquired a value of $115 a share.

Memorial of Pacific Railroad.

Ninth. That on the twenty-third day of December, 1864, William M. McPherson, Hudson E. Bridge and Adolphus Meier, composing a committee of the board of directors of the Pacific Railroad, appointed for the purpose hereinafter

*Subexhibit F to Exhibit 20.

expressed, presented to the county court of St. Louis County a memorial * which opens with the following language:

"At a late meeting of the board of directors of the Pa-

Destruction of the road by Prices raid.

cific Railroad the undersigned were appointed a committee to confer with your honorable body in relation to the present condition and prospects of the Pacific Railroad,

135 and to ask the aid of the county in completing this great work, so important to our State and of especial interest to the city and county of St. Louis." Said memorial then proceeds to describe specifically the destruction of the property of the Pacific Railroad which had taken place in consequence of an invasion of the State by insurrectionary forces under command of Gen. Price, in the September preceding; and the memorialists estimate the cost of repairing such destruction and completing the road and putting the same in successful operation at the sum of $700,000. The memorial then proceeds as follows: "This sum we have lost, as the result of the invasion. This amount

Amount asked for.

we want the county to provide, by issuing to the company the bonds of the county (under authority to be given by the legislature), bearing seven per cent. interest, the same to be a loan to complete the road, the company to refund to the county the principal and interest as the same matures.

Reasons for making the application.

"We make this application under the belief that the great value of a completed road to the city and county of St. Louis would justify the expenditure, even if it should never be returned in money by the company.

"We ask it because, for the reasons above stated, we must raise this much money or let the work stop where it is, and our people lose all the benefits to result from a completed road.

"We ask this of the county, because the city and county of St. Louis, in their corporate capacities, own nearly one-half of the stock of the company, and therefore every citizen is interested in the completion of the road, as a means of enhancing the value of the stock.

"Although we are directors of the road, sent before you to make known the wants of the company, yet our interest as tax-payers is much greater than any interest we hold individually in the road; and we could not feel justified in asking this aid from the county, if we did not believe

Reasons for making the application.

136 that the best interest of every tax payer in the county was to be promoted by the early completion of the road. We are not before you seeking to promote private and selfish ends, but we claim to come as the representa-

tives of a great public enterprise, of such magnitude as to interest in common every tax-payer in the county.

"We want the loan of seven hundred thousand dollars, and we have shown for what purpose it is wanted. We are aware that a less sum has been spoken of, but a less sum will not complete the road. If, as we assume, a common interest requires the completion of the road, there is no use in driving hard bargains with ourselves, or delay the completion of the work by a blind economy. With the sum asked for the road can be opened to Kansas City, if protected from further hostile interference, as we now feel confident it will be. It is true that money to complete the track does not supply all our wants. We shall, for the extended read, need twenty new locomotives (which have been contracted for); we shall want six new passenger-cars, eighty more flat cars, and fifty box cars, costing in the aggregate seven hundred [thousand] dollars. To procure this necessary rolling-stock we must rely upon the earnings of the road and the individual credit of the directors.

"We have full confidence in the future of the road, if hastened to completion before more enterprising rivals shall divert the trade.

"If completed, we believe that the earnings of the road will soon furnish all the equipments required for the increased business, pay off the $1,500,000 mortgage, provide for the payment of the county bonds now asked for, and in six or seven years commence paying on the bonds issued by the State for our benefit. But should the financial success of the enterprise not equal our expectation, the importance of the road as a great artery of trade
137 and commerce will fully justify the expenditure asked for.

"All of which is respectfully submitted.

"WM. M. McPHERSON.
"HUDSON E. BRIDGE.
"ADOLPHUS MEIER."

Tenth. That this memorial was taken under advisement by the county court on the day it was presented, and on December twenty-ninth, 1864, the following proceedings were had in said court in reference thereto: Action of the county court.

STATE OF MISSOURI,
County of St. Louis, ss:

In the county court of St. Louis County, December term.

THURSDAY, *December 29th*, 1864.

Pacific Railroad.

The court this day takes up the application of the Pacific Railroad for the issuing of $700,000 St. Louis County bonds to aid in the completion of said road. Whereupon Mr. Justice Fisse submits the following for the action of the court, viz:

"Whereas the directors of the Pacific Railroad Company Proposition of Mr. Justice Fisse.

have submitted to the court their memorial setting forth the condition of the company, as well as the injury done it by the recent rebel raid into our State by the destruction of so large a portion of its property, and praying the court to issue, under authority to be obtained, $700,000 St. Louis County bonds, to be loaned to the said company, in aid of completing the road to Kansas City; the committee in their verbal explanations promising that the company would be prepared to pay all interest accruing, as well as the bonds when matured. And after a mature and deliberate consideration of the questions therein set forth, and appre-
138 ciating the necessity of the early completion of the road, as also the benefits to accrue to St Louis County thereby:

"It is ordered by the court that they will not be adverse to issue St. Louis County bonds to the amount $700,000 in aid of completing the Pacific Railroad to Kansas City, if the following conditions are embodied in the law to be passed for that purpose:

"1. The county court to be authorized to issue $700,000 St. Louis County bonds in aid of the Pacific Railroad Company, the proceeds of which shall be used for no other purpose than completing the road to Kansas City. The bonds to become due and payable in the city of New York twenty years after date, bearing seven per cent. interest, payable semi-annually at the same place.

"2. The State to relinquish so much of the mortgage on the road as covers the rolling stock, which shall then be mortgaged by the company to the county of St. Louis as security for the $700,000 bonds issued.

"3. That the company shall pay into the county treasury at least thirty days prior to the time the semi-annual interest shall become due and payable, the full amount of such interest; and in the event of the company failing to pay into the county treasury as above specified, then the whole debt to become due, and the county court empowered and instructed to foreclose the mortgage.

"4. The act to be submitted to the voters of Saint Louis County for their acceptance or rejection; and only those who are actual tax-payers shall be entitled to vote at such election."

Proposition of Mr. Justice Taussig.

Whereupon Mr. Justice Taussig offers the following substitute:

"In the matter of the application of the Pacific Railroad to issue $700,000 bonds, etc., it is ordered, in view of the importance of the completion of this road to the tax-payers of this county, that this court will concur (in case application should be made by said Pacific Railroad) in the propriety of the passage of the following act, securing
139 the completion of said road and the interest of the county of St. Louis in the issue of said bonds.

Proposed act of legislature.

"'Be it enacted by the general assembly of the State of Missouri, That the county court of St. Louis County is hereby authorized to issue seven hundred bonds of one thousand dollars each, having twenty years to run, and bearing interest at seven per cent. per annum, payable

semi-annually in the city of New York, and loan said bonds to the Pacific Railroad Company for the completion of said road. Said bonds to be issued under such conditions as may be agreed upon between said county court and the board of directors of the Pacific Railroad; and the fund commissioner of the Pacific Railroad Company shall pay every month four thousand dollars, and one thousand dollars additional in each month of December, to the treasurer of St. Louis County to meet the interest on the above seven hundred bonds; said payments to continue until said bonds are paid by the Pacific Railroad Company.'"

Whereupon, Justice James offers the following amendment: "Provided, That no bonds shall be issued, unless the question of said issue shall first have been submitted to a vote of a majority of the voters of St. Louis County." Amendment of Mr. Justice James.

Which amendment the court overruled, Justices Alt and James voting in favor of the amendment, and Justices Able, Charles, Fisse, Yore, and Taussig against the amendment.

And thereupon, a vote being taken upon the proposition offered by Justice Taussig, as herein above set forth, the same was concurred in by the court by the following vote: Ayes—Messrs. Able, Charles, Yore, and Taussig. Nays—Messrs. Alt, James, and Fisse.

Eleventh. That on the seventh day of January, 1865, the legislature of the State of Missouri passed an act entitled "An act authorizing the county of St. Louis to issue bonds," Act of Jan. 7, 1865.

which act is in words and figures following, to wit:

140 "§ 1. The county court of St. Louis County is Section 1. hereby authorized to issue seven hundred county bonds of the denomination of one thousand dollars each, having twenty years to run, and bearing interest at the rate of seven per cent. per annum, payable semi-annually, the principal and interest payable in the city of New York, and loan said bonds to the Pacific Railroad Company for the completion of said road; said bonds to be issued under such conditions as may be agreed upon between said county court and the board of directors of the Pacific Railroad Company; such conditions to be binding on the parties, but shall not impair or affect the validity of the bonds after they are issued.

"§ 2. The fund commissioner of the Pacific Railroad, or Section 2. such person as may at any time hereafter have the custody of the funds of said railroad company, shall, every month after said bonds are issued, pay into the county treasury of St. Louis County, out of the earnings of said Pacific Railroad, four thousand dollars, and one thousand dollars additional in each month of December, to meet the interest on the said seven hundred bonds; said payments to continue until said bonds are paid off by the Pacific Railroad."

Twelfth. That thereafter, on the tenth day of January, 1865, the president of the Pacific Railroad presented to said county court a written opinion of George E. Leighton, esq., an attorney at law, which opinion is in words and figures following, to wit: Opinion of George E. Leighton, esq.

[George E. Leighton, attorney and counsellor, St. Louis, Mo.; office, 47 Chestnut street.]

ST. LOUIS, *January 10th*, 1865.

Col. GEO. R. TAYLOR,
Pres't Pacific Railroad:

DEAR SIR: In reply to your communication of yesterday touching the construction and effect of the 2d section of the act approved January ——, 1865, I have to say:

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The fund commissioner a trustee or receiver.

The fund commissioner is a public officer created by the act of February 10th, 1864. His position and duties, as defined by that act, are in general terms those of a general trustee or receiver, holding, with the assent of the company (as expressed by their acceptance of the act), the earnings of the company upon certain express trusts, among which are paying expenses of operating, &c., the road, paying interest and principal of loan under that act, and paying interest upon and purchasing State bonds. It is in the last of these only that the State as cestui que trust, under the relations so established, has an interest, which could be affected by legislation.

Conditions of the proposed loan.

The 1st section of the present act authorizes the county court to loan, &c., under such conditions as may be agreed upon. Although not mentioned in express terms, the act presupposes or rather anticipates an agreement to the effect, that the money for the payment of interest upon these bonds shall be furnished the county, out of the earnings of the company. But as such an agreement could not be carried into effect—for under the act of February 10th, 1864, such earnings are not within the control of the company, but are in the hands of the fund commissioner (as trustee) for the benefit of the State as a cestui que trust—the 2d section is enacted for the purpose of giving effect to such agreement, and makes it the duty of the fund commissioner to pay out of the earnings of the road certain sums monthly. If the act should be accepted by the company, and the county court should make the loan authorized, the act would be binding upon all the parties in favor of the county court, to wit, the company, the fund commissioner, and the State, and neither could object to its execution.

Creates an equitable lien or charge.

An agreement executed by the company, expressing its assent to such appropriation of the earnings of the

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road, would then, in my opinion, create in favor of the county an equitable lien or charge upon the earnings, pro tanto.

Postpones rights of the State.

The direct authorization of such an appropriation of the earnings, or rather the direction to the fund commissioner (the trustee) to pay this monthly appropriation out of funds, to the benefit of which it (the State) is entitled, is unquestionably, in my opinion, a waiver or postponement of the interest of the State, cestui que trust in favor of the county, to the extent and for the purpose specified in the act.

The act admits of no other construction. The first section of the act, which authorizes the loan, is enacted by the

State purely in its legislative capacity. The second is, in effect, a partial release of its interest, for the State can have no legal control over this fund, except as a cestui que trust, under the relations heretofore established, and then only over its interest. In this respect it occupies no higher relation than an individual would, holding the same claims.

By directing, therefore, with the assent of the company, a different appropriation of the funds to which it was before the passage of the act entitled, it postpones or waives its own claim to that extent, in favor of the party authorized by this act to receive, viz, the county of St. Louis.

The claim of the county upon the earnings of the road, under this act, could be easily enforced. The fund commissioner is a public officer, and where his duty is well defined and, as under the second section of this act, purely ministerial, he may in case of a failure to pay over the amount monthly as directed by the act, be proceeded against by mandamus, and compelled to perform the duty enjoined upon him by law.

Fund commissioner might be coerced by mandamus.

Very respectfully, your obedient servant,

GEO. E. LEIGHTON.

143 I find that this communication related to the matter here in controversy, and not, as the respondents allege in their answer, "solely to the rights of the railroad company as bondholders as against the State." There is no direct evidence that the said communication was ever exhibited to the justices of the county court, or taken into consideration by them in making up their decision in the premises; but this is to be inferred, I think, from the fact that it was filed and preserved by the clerk of the county court among the records thereof, and that it was apparently drawn up with the view to influence the judgment of the county court in the premises.

Finding as to this communication.

Thirteenth. I find that thereafter, on the fourteenth day of January, 1865, Henry A. Clover, esq., then and there being the county counsellor for St. Louis County, addressed and delivered, in his capacity as such county counsellor, to the Hon. John H. Fisse, then and there being chairman of the said county court, an opinion in words and figures following, to wit:

Opinion of Henry A. Clover esq.

ST. LOUIS, *January* 14, 1865.

Hon. JNO. H. FISSE:

DEAR SIR: Your note of this date, enclosing a copy of a certified copy of an act authorizing the county of St. Louis to issue bonds to the amount of seven hundred thousand dollars, and to loan the same to the Pacific Railroad, is before me.

You therein desire my opinion upon several propositions as to the legal effect of the second section of the act, and if (whether) the payments therein fixed are secured to the county beyond all contingencies until such times when the bonds themselves may be paid by the Pacific Railroad Company.

The second section of the act is brief enough for me to

here transcribe. It reads thus: "The fund commissioner of the Pacific Railroad, or such person as may at any
144 time hereafter have the custody of the funds of said railroad company, shall every month after said bonds are issued pay into the county treasury of St. Louis County, and out of the earnings of said Pacific Railroad, four thousand dollars, and one thousand dollars additional in each month of December, to meet the interest on the said seven hundred bonds. Said payments to continue until said bonds are paid off by the Pacific Railroad."

The first matter which strikes my mind is that no provision whatever is made for the payment of the bonds themselves, or as to how or out of what fund they are to be paid, or what security is offered beyond the responsibility of the railroad for their payment when due.

As to whether the payments of the interest are secured beyond all contingency, I would say that by virtue of an act for the extension and completion of the Pacific Railroad to the western boundary of the State, at Kansas City, and the North Missouri Railroad to Iowa State line, to complete the Southwest Branch of the Pacific Railroad, and to reduce the State indebtedness, approved February 10th, 1864, the company is authorized to borrow one million five hundred thousand dollars on its bonds, having four, five, and six years to run in equal proportions; said bonds to be secured by a first mortgage of a part of the main line of the road, the State relinquishing her first lien and mortgage and right of forfeiture upon that part of the road. All the net profits of the road, it is provided, shall be applied to the extension and equipment thereof until completed, reserving, however, sufficient for the payment of the interest accruing semi-annually on the bonds which should be sold, and after the completion of the road any surplus over the accruing interest shall be applied to the purchase or payment of the bonds themselves.

Further, out of the gross earnings of the road from all sources, and all other sources of revenue belonging to or connected with said railroad, the fund commissioner
145 is to pay for the operating of the road, and of the net earnings of the road, after paying the expenses of his salary, he is to apply those earnings to the extension and equipment of the road, reserving, however, sufficient for the payment of the interest accruing semi-annually on the bonds authorized by the act which might or should be actually sold, and after the completion of the road any surplus over the accruing interest is to be applied to the purchase or payment of the bonds themselves; second, to the payment of the interest as the same shall become due and payable on the first-mortgage bonds issued and exchanged, as provided in section six of said act; and next, not to exceed six per centum dividend on the preferred stock, as provided in section eight of the act; and the surplus, if any, to the purchase of the outstanding bonds, with interest coupons thereon, and at the least market rates.

Opinion of H. A. Clover, esq.

This comprises all the directions to the fund commissioner as to the disposition of all the moneys which shall

come into his hands, except moneys arising from the sale of bonds authorized by the act, which moneys are to be by him applied to the construction and equipment of the road.

Now, on the seventh of January, 1865, the legislature enacts a law requiring the fund commissioner out of the funds of the company to pay a sum of money to meet the interest on other bonds which are by the act authorized to be issued. And the question may be asked under which enactment is the fund commission to proceed—to apply the moneys coming to his hands as directed by the act of February 10, 1864, or as directed by the act of January, 1865?

The bondholders under the act of 1864 have two securities for the repayment of their money; first, a mortgage upon a portion of the main line of the road; and, second, the net profits of the road.

These securities are clearly given in the act, and the bondholders have undoubtedly a right to look to both
146 securities. They may have loaned their money upon the faith of both securities. They probably did look to the mortgage for the payment of their indebtedness, and to the net earnings of the road for the payment of the interest upon their indebtedness.

Opinion of H. A. Clover, esq.

Can the legislature divert this fund, or any portion of this fund, to the securing of subsequent creditors who contract with a knowledge that the security which they accept has been already pledged to another and earlier creditor?

That is the question.

It strikes me very forcibly that there is a contract between the bondholders and the company, which contract is authorized and sanctioned by the legislature and which forbids that body from imparing the obligation of a contract by the passing of this act, with or without the will of the company.

Wherefore I conclude that the payments fixed in the 2d section of the act, upon the proper construction of which you have asked my opinion, are not secured to the county beyond all contingencies at all, until the time when the same may be paid by the Pacific Railroad.

The county without security.

You ask further, what would be the effect upon the security if the State, at any time after the year 1870, and prior to the time of the maturity of the bonds, should foreclose the first mortgage and sell the road to a new company. And you ask further, would the second section of the act referred to be binding upon such new company; and if not, to whom could the county look for the payment of said bond?

To which I answer, if the State sells the road under a prior mortgage to a new company, the security given by the act will be lost; the purchaser under the mortgage would not be bound by the provisions of the act of 1865, and the county could look to nobody in particular for the payment of the bonds, though the State might, under the circumstances, feel an obligation to refund to the county in the case supposed.

Opinion of H. A. Clover, esq.

147 You ask, in conclusion, what steps will be necessary to make the act if accepted by the court binding upon the Pacific Railroad.

To which I can hardly make reply. The act, if acceptable to the county court, is binding upon the Pacific Railroad; but how binding the obligation may be is a different question.

I suppose if the bonds are issued and loaned the ultimate dependence for their payment, principal and interest, lies in the responsibility of the company present and future, in its ability to pay—if it is able, it can be compelled to; otherwise, of course not.

I am, respectfully, your obedient servant,

H. A. CLOVER.

And that the said opinion was by the said Fisse laid before said court.

Order granting the loan Jan. 18, 1865.

Fourteenth. That thereafter, on the eighteenth day of January, 1865, an order was adopted by the said county court of St. Louis County, in words and figures following, to wit:

STATE OF MISSOURI,
County of St. Louis, ss:

In the county court of St. Louis Co., January term, 1865.

WEDNESDAY, *January 18th*, 1865.

Ordered by the court:

The provisions of an act of the general assembly of the State, entitled an act authorizing the county of St. Louis to issue bonds, approved January 7th, 1865, is hereby by the county of St. Louis accepted, and upon the passage of a resolution of the board of directors of the Pacific Railroad, binding them likewise to the provisions of said

Order granting the loan Jan. 18, 1865.

148 act, an issue of bonds of the county to the number of seven hundred, each of the denomination of one thousand dollars, having twenty years to run, and bearing interest at the rate of seven per cent. per annum, payable in the city of New York semi-annually, is hereby ordered, which are to be delivered to and loaned by the county to the Pacific Railroad for the completion of said road. And the Pacific Railroad is likewise required by the action of its board and authorities to assume the prompt payment of said bonds at their maturity, so that the same may constitute a legal indebtedness on the part of said Pacific Railroad to the county of St. Louis for the bonds hereby ordered to be issued and loaned. The said bonds are to be sold upon such terms as this court or its presiding officer may agree upon.

Amendment of Mr. Justice Fisse.

Whereupon Mr. Justice Fisse proposed the following amendment, to wit:

"But no bonds shall be issued until the question has been first submitted to the qualified voters of St. Louis County for their acceptance or rejection, at a special election to be held for that purpose on the first Monday of Feb-

ruary next, and the majority of the votes then cast shall be in favor of issuing said bonds as above stipulated."

Which amendment the court refused to adopt by the following vote: For the amendment, Justices Alt, Fisse and James. Against the amendment, Justices Able, Charles, Yore, and Taussig. Rejected.

Whereupon the court adopt the order submitted by the committee as aforesaid, by the following vote, and declared to be the order of this court: In favor of the order, Justices Able, Charles, Yore, and Taussig. Against the order, Justices Alt, Fisse, and James.

Fifteenth. That thereafter, on the nineteenth day of January, 1865, the board of directors of the Pacific Railroad passed a resolution in words and figures following, to wit:

149 OFFICE OF THE PACIFIC RAILROAD,
St. Louis, January 19, 1865.

The terms of the loan accepted by the Pacific Railroad.

At a meeting of the board of directors of the Pacific Railroad, held this day at their office in the city of St. Louis, the following resolution was adopted:

Resolved, That the board of directors of the Pacific Railroad unanimously accept of the terms, provisions, and obligations set forth and contained in an act of the general assembly of the State of Missouri, entitled "An act authorizing the county of St. Louis to issue bonds," approved January 7, 1865, to be observed and faithfully performed by this company, and that the president be and he is hereby instructed to execute an agreement, under the seal of the company, obligating the said company to promptly pay, at maturity, the said bonds authorized to be issued by said act.

Resolved further, That this company accept of the terms and provisions of an order of said county court, now here present and certified by the clerk of said court under its seal, and hereby obligate the company to an observance and faithful performance of all the provisions contained therein.

I, John C. Porter, secretary of the Pacific Railroad, hereby certify that the preceding is a true copy of the resolution adopted by the board of directors of the company, as the same appears upon the records of said railroad.

In testimony whereof I have hereunto set my hand and affixed the corporate seal of said Pacific Railroad.

[SEAL.] JNO. C. PORTER,
Sec'y Pacific R. R.

Letters of the president of the Pacific Railroad.

That said resolution was, on the twenty-fourth day of January, 1865, transmitted by the president of the Pacific Railroad to the said county court, in a letter in which he, the said president, used the following language: "I

150 shall be at all times ready to execute on behalf of this company such instruments of writing as shall be necessary to perfect the orders of your honorable court and this company in the premises;" that the said resolution was, on the 26th day of January, 1865, filed among the records of the said county court, and referred to the committee on the Pacific Railroad and the county counselor, with instruc-

Letter of the president of the Pacific Railroad.

tions to report articles of agreement between the county and said railroad company relative to the bonds therein mentioned.

Letter of H. A. Clover, esq. "Nothing further is needed to bind the Pacific Railroad," etc.

Sixteenth. That thereafter, on the 30th day of January, 1865, the county counselor of said St. Louis County, H. A. Clover, esq., addressed to the said county court a letter containing the following language:

ST. LOUIS, MO., *January 30th*, 1865.

To the Hon. County Court of St. Louis County:

GENTLEMEN: In my opinion nothing further is needed to bind the Pacific Railroad in the matter of loan of seven hundred of the bonds of the county to the said company for the completion of said road. The resolution of the company of the 19th inst. obligates it to an observance and faithful performance of the provisions of the order of the court of the 18th inst., for the prompt payment of said bonds at their maturity.

Respectfully, &c.,

H. A. CLOVER.

Concurred in.

Which communication was concurred in by a committee of the said court, composed of Justices William Taussig, Benjamin Charles, and John E. Yore, and which report the court did, by an order then and there made and entered of record, approve.

The bonds delivered.

Seventeenth. That thereafter, in pursuance of the authority granted by the act of the legislature of the State of Missouri hereinbefore recited* and the order of the county court of St. Louis County, dated the 18th day of January, 1856, hereinbefore set forth,† there was executed and 151 delivered by the county of St. Louis 700 bonds of 1,000 each, each of the description set forth in the said order, which said bonds were received by the Pacific Railroad in amounts as follows, that is to say: 100 bonds on the 20th day of February, 1865; 200 bonds on the 7th day of March, 1865; and 400 bonds on the 5th day of May, 1865; which said bonds were afterwards sold by said Pacific Railroad and the proceeds realized therefrom used in the completion of said Pacific Railroad.

* Act of Jan. 7, 1865.

† *Supra*, p. 59.

Testimony of William Taussig —Why a mortgage was not taken.

Eighteenth. I am requested by counsel for the respondents to embody in this report a synopsis of the testimony of William Taussig, who at the time this loan was made was one of the justices of the county court of St. Louis County. Both parties seem to consider this testimony as of value to them; but, after reading it carefully, I do not attach much importance to it, and deem it best not to encumber this report with an abstract of it. It will be found in my record herewith submitted,* the material portion of it commencing near the bottom of page 27. The chief point in it is, that the county court was appealed to to make this loan, not only by a committee representing the directory of the Pacific Railroad, but also by "a very large delegation of citizens"; that after several meetings, in which various expedients were discussed, it was deemed impracticable for the county to obtain

* Exhibit A to master's record.

an absolute security, and the security which was obtained was deemed the best that the circumstances would admit of. He is positive in his statement that the county court was more influenced by the committee of citizens than by the owners of the road. He says: "We intended to get the best possible security without crippling the road and without defeating the object, and enabling it at the same time to finish that piece of the road; because, in our opinion, any stronger condition which we would have required would have been simply nugatory—might as well have done nothing at all. The fund commissioner being a State officer, and he having charge of the funds, the security was really considered a State security. * * * * Of course we did not
152 know what the legislature would do afterwards. We were not dependent upon the good-will of the road, but upon the integrity of the State officer."

Facts occurring subsequent to the loan.

The intervening petition avers that the claim of the county of St. Louis has always been recognized as a statutory lien, while the answers of respondents, denying the allegations of the intervening petition, aver that it has always been considered and recognized by the State of Missouri, the county of St. Louis, and the Pacific Railroad, that the county of St. Louis has no lien whatever, and that said county, State, and railroad corporation represented to the purchasers buying under the mortgages represented by the respondents that the county had no lien whatever. As pertinent to these issues made in the pleadings referred to me, I find the following facts occurring subsequently to the making of the loan:

Description of the loan of St. Louis County in financial statement of 1866.

Nineteenth. That on the thirtieth day of November, 1866, the Pacific Railroad issued a printed "financial statement," in which its contracted indebtedness was enumerated, the debt due St. Louis County being described as follows: "$700,000, at 7 per cent. per annum, due the county of St. Louis for bonds maturing in 1885, for which there is no lien on the road." That the volume in which this financial statement was published* also contains a copy of the act of January seventh, 1865, authorizing the county of St. Louis to issue the bonds here in controversy, and also a copy of the order of the county court of St. Louis County of January eighteenth, 1865, ordering the issue of said bonds, both of which are hereinbefore set out.

*Deposition of C. L. White, in Exhibit A to master's report.

Twentieth. That by a resolution of the county court of March twenty-fifth, 1867, the presiding justice was ordered to "cast the vote of the county for directors of Pacific Railroad for those gentlemen who are opposed to the sale of the road, unless the interest of the county of St. Louis is protected by the terms of sale."

Act of March 31, 1868, to sell road and foreclose State's lien.

153 Twenty-first. That on the thirty-first day of March, 1868, the legislature of the State of Missouri passed an act entitled "An act for the sale of the Pacific Railroad, and to foreclose the State's lien thereon, and to amend the charter thereof." Which act, after providing for a sale of the Pacific Railroad in pursuance of the act of February twenty-second, 1851, contained the following further provisions:

"SECTION 5. If the Pacific Railroad Company shall, at

Section 5. Company may purchase on what terms.

any time within ninety days after the first day of April, 1868, pay into the treasury of the State the sum of three hundred and fifty thousand dollars, in the bonds of this State, or in money, then, and in that event, the Governor shall not advertise said road for sale; and if the said company shall, within ninety days thereafter, pay into the State treasury an additional sum equal to five millions of dollars in all (the same being either in cash or Missouri State bonds), the governor shall, upon the production of the receipts of the State treasurer for said amounts, execute and deliver to the said Pacific Railroad Company a deed of release for all claims, title, and interest which the State of Missouri has in and to the said Pacific Railroad, its property and appurtenances; and the said Pacific Railroad Company shall, from and after the delivery of said deed, be fully discharged from all claims or debts due to the State, and all liability growing out of the issue of the bonds of the State to aid in the construction of said road, and no sale shall, in that event, take place under this act. * * * * * * *

"SEC. 6. In case of a sale of said road under the provisions of sections one, two, three, and four of this act the State of Missouri shall assume the payment of principal and interest due on seven hundred thousand dollars in bonds issued by the county of St. Louis as a loan to the Pacific Railroad Company, under the act of January 7, 1865, and also the floating debt of said company existing at the time of the passage of this act, not to exceed the amount of six hundred and fifty thousand dollars.

Section 6. In case of sale, St. Louis County protected.

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"SECTION 10. All bids and proposals for the purchase of said road shall assume, first, the payment of principal and interest, due and to become due, on the one million five hundred thousand dollars first-mortgage bonds, issued under the act of February 10, 1864; second, the principal and interest due on the seven hundred thousand dollars bonds, issued by the county of St. Louis to the Pacific Railroad Company, under the act of January 7, 1865; third, the floating debt of said Pacific Railroad Company, existing at the time of the passage of this act, not to exceed the amount of six hundred and fifty thousand dollars."

Section 10.

Bidders to assume payment of bonds of St. Louis County.

Twenty-second. That said railroad was not sold as provided for in sections one, two, three, and four of said acts, but that within the time specified in the fifth section of said act, the Pacific Railroad paid into the treasury of the State the amounts therein specified, and that the governor of the State thereupon delivered to the Pacific Railroad a release of the State's lien as provided by said section.

State's lien purchased by Pacific Railroad and released.

Twenty-third. That in order to enable it to accomplish a release of the State's lien under the provisions of section 5 of said act, and to retire the "Dresden bonds," the Pacific Railroad, on the 15th day of July, 1868, executed the so-called first mortgage to Uriel A. Murdock, James Punnett and Luther C. Clark, trustees, to secure bonds to the amount of $7,000,000, maturing twenty years from August first, 1868, said bonds being in the denomination of $1,000

The "first mortgage"; its nature and purposes.

each, and bearing interest at the rate of six per cent. per annum, payable semi-annually in gold coin, upon the presentation of coupons attached to said bonds. This mortgage conveyed the entire line of the Pacific Railroad, extending from the depot at Fourteenth street, in the city of St. Louis, to Kansas City, together with all the appurtenances and franchises of the railroad. The mortgage recites that the State of Missouri is the "holder of the first
155 mortgage upon said railroad and appurtenances," subject to the Dresden mortgage for $1,500,000, and declares that the mortgage is made in order to retire the Dresden mortgage, and to purchase the claim of the State of Missouri under provision of an act of March 31st, 1868, entitled "An act for the sale of the Pacific Railroad, and to foreclose the State lien thereon, and to amend the charter thereof"; and the recitals in the mortgage further declare that the State of Missouri "is now the encumbrancer of the said railroad in the same manner as if it were the holder of the first mortgage upon said railroad and its appurtenances, except, however, that the State of Missouri, by act of February 10th, 1864, authorized the issue by said railroad of $1,500,000, the bonds issued therefor to take precedence of the State lien, and be a first lien upon that portion of said railroad and its appurtenances extending from Dresden to Kansas City, and releases to that extent the first lien of said State of Missouri upon said portion of said railroad, but retained a second lien thereon."

The "first mortgage"—its nature and purposes.

Twenty-fourth. That on the first day of July, 1871, the Pacific Railroad executed its so-called second mortgage to Edwin D. Morgan and Joseph Seligman, trustees and respondents herein, to secure the payment of $3,000,000, represented by bonds of $1,000 each, bearing interest at the rate of seven per cent. per annum, payable semi-annually in currency, the bonds maturing twenty years after July first, 1871. This mortgage purported to be a second lien on the property and franchises of the Pacific Railroad.

The "second mortgage."

Twenty-fifth. On the nineteenth day of April, 1872, as will appear from the admitted facts in the pleadings in the principal case, the Pacific Railroad executed a mortgage called the "real estate mortgage," upon certain real estate in the city of St. Louis, which was asserted to be a first lien thereon to secure the payment of $800,000 in bonds, maturing twenty years after April nineteenth, 1872.

The "real estate mortgage."

Twenty-sixth. That by deed of lease dated January twenty-ninth, 1872, the Pacific Railroad leased all its prop-
156 erty for a term of nine hundred and ninety-nine years, to the Atlantic & Pacific Railroad Company. As a part consideration for the use of the leased property, the latter company agreed to pay the interest accruing from time to time on the various bonds of the Pacific Railroad, and also upon "certain bonds of the county of St. Louis, which were by said county loaned to the said Pacific Railroad, and which it undertook and agreed to pay, * * * all of which said bonds, except the St. Louis County bonds, are secured by mortgages." The lien of St. Louis County

Lease by Atlantic & Pacific Railroad.

Lease by Atlantic & Pacific Railroad Co.

is not spoken of otherwise than in the language which I have quoted.

Monthly installments of interest paid.

Twenty-seventh. During the continuance of this lease, up to May first, 1875, the county of St. Louis received the monthly installments of interest accruing from time to time from the Atlantic & Pacific Railroad, receipting for the same as received from said company as the lessee of and agent for the Pacific Railroad.

Case of Murdock vs. Woodson.

Twenty-eighth. That on July first, 1873, Uriel A. Murdock and Luther C. Clark, the trustees in the aforesaid "first mortgage," filed a bill of complaint in the circuit court of the United States for the western district of Missouri, to enjoin the governor of the State from selling the property of the railroad under a lien, which was claimed by the State still to subsist in its behalf. The nature and purpose of this case are disclosed in the case of Murdock vs. Woodson (2 Dillon C. C., 188), and in the same case on appeal to the United States Supreme Court (22 Wallace, 351). In the bill of complaint it was averred as one of the equitable, if not legal, grounds for sustaining the release which had been made by the State of its lien, under the provisions of the act of March thirtieth, 1868, that, if the road had been sold under the State's lien, the county of St. Louis and other creditors would have been foreclosed; but that the release by the State to the company left the stock of the city and county, and the taxpayers of the county, amounting in the aggregate to $2,278,000, intact, and left the liability remaining on the proper party to pay the floating debt of
157 the company and the bonds issued by St. Louis County. The said bill of complaint also contained the following recitation:

Case of Murdock vs. Woodson; allegations of bill.

"They (the complainants) say that the road was finally put in running order, through to the western boundary of the State, in the year 1866; but the Dresden bonds, together with the loan of the county credit, as aforesaid, proved insufficient to pay for such extension, and for the repairs and equipments rendered necessary by the circumstances hereinbefore stated, and at the time of such completion of the road there remained due by the company (which was chiefly held by citizens of Missouri, for labor and materials) a large floating debt, which, in equity and good conscience, together with the loan by St. Louis County, possessed claims for payment not inferior to those possessed by the State under its statutory mortgage."

"Carondelet Branch mortgage."

Twenty-ninth. That on October first, 1873, as will appear from the admitted facts in the pleadings in the principal case, the Pacific Railroad executed its so-called "Carondelet Branch mortgage," on its branch road, extending the distance of thirteen miles, from Kirkwood to Carondelet, and called the Carondelet Branch, to secure $500,000 in bonds maturing in twenty years from date, and purporting to be a first lien on the said Carondelet Branch and all its structures and appurtenances.

"Third mortgage."

Thirtieth. That, on July tenth, 1875, the Pacific Railroad executed its so-called "third mortgage" on its railroad

property, appurtenances and franchises, to secure the payment of $4,000,000, represented in bonds of $1,000 each, bearing interest at the rate of seven per cent. per annum, payable annually, said bonds maturing on May first, 1895.

What mortgage bonds negotiated.

Thirty-first. That it appears from the pleadings in the principal case that all the bonds secured by the first mortgage, the second mortgage, the real estate mortgage, and the Carondelet Branch mortgage have been negotiated, and also that, on November eleventh, 1875, the date of the filing of George E. Ketchum's bill of complaint in

158 the principal case, $2,300,000 of the third mortgage bonds had been issued and actually negotiated, and that the remainder were in the hands of the trustees to be exchanged for "income bonds," which had previously been issued by the company.

What bonds negotiated.

Mortgages duly recorded.

The nature of the mortgages heretofore referred to will be found described in the bill of complaint of George E. Ketchum, in the present case. The pleadings in the case show that all the mortgages heretofore referred to and described in the bill of complaint were recorded in the proper offices. It is further averred in the answer of respondents, and not denied in the reply of the intervenor thereto, that the first mortgage, second mortgage, and third mortgage, heretofore referred to, were each and all duly recorded in each county in which the respondents had property, as required by law.

Bonds bought and sold under belief that St. Louis County had no lien.

*Exhibit B to master's report.

Thirty second. That Francis A. Fogg, William H. Coffin, Darius R. Mangam, and Andrew V. Stout, all residents of the State and city of New York,* dealt in the bonds of the Pacific Railroad, secured by the mortgages above named, with the belief that the claim of the county of St. Louis here in controversy was an unsecured claim, or, at least, such a claim as would be in law postponed to the said mortgages. They seem to have derived their information from statements of parties representing the railroad company, from general reports and the general understanding among men dealing in these securities. Hudson E. Bridge, Joseph Brown, and Poor's Railway Manual were mentioned by different witnesses as the sources from which they derived their information.

Default in payment of interest; institution of proceedings by St. Louis County.

Thirty-third. That on October 18th, 1875, H. Reichtein, the county treasurer, reported to the county court of St. Louis County that the Pacific Railroad had failed to pay interest on its bonds for four and one-half months, amounting to $18,000. The court thereupon ordered and instructed the county counselor to institute proceedings immediately to recover the money. On October 21st, 1875, the

Institution of proceedings by St. Louis County.

159 county court of St. Louis County adopted the following resolutions:

STATE OF MISSOURI,
County of St. Louis, ss:

In the county court of St. Louis County, October term, 1875.

THURSDAY, *October 21st*, 1875.

Resolution of Justice Finney.

Justice Finney offers the following, which the court adopts:

"Whereas the affairs of the Missouri Pacific Railroad are in an unsatisfactory financial condition; and

"Whereas said railroad company is now indebted to the county of St. Louis in the sum of seven hundred thousand dollars ($700,000), loaned to said company without security in the year 1865, together with a considerable sum of unpaid interest thereon; and

"Whereas there is good reason to believe that, if immediate and strenuous efforts are not made, the county of St. Louis will lose a large sum of money, it is therefore

"Ordered, that a committee of three be appointed to confer with the county counselor, and to direct and cause to be instituted such proceedings and suits as shall be found necessary to protect the interests of the county in the premises.

Additional attorneys employed.

"In pursuance of the foregoing order the court appoint Justices Farrar, Finney, and Presiding Justice Schultz as the committee designated in said order."

On October twenty-eighth, 1875, the committee appointed under the last-mentioned resolution were authorized by the county court to employ such additional attorneys to assist the county counselor in prosecuting the claim of St. Louis County as they should deem advisable; and on the same day, October twenty-eighth, 1875, the county of St. Louis filed a petition in bankruptcy in the United States district court for the eastern district of Missouri against the Pacific Railroad. The alleged ground of bankruptcy was that the company had, while insolvent, executed the "third mortgage," in order to give a preference to certain pretended creditors, and "to hinder and delay its creditors and defraud the petitioner." The petitioner averred that its demand was provable under the act of Congress concerning bankrupts; that it constituted one-fourth in number of the creditors of the company, and that the aggregate amount of its debt, provable under said act of Congress, as described in its petition, amounted to at least one-third of the unsecured debts provable against the company under said act of Congress. The nature of the county's demand against the company is described in the petition as follows, to wit: "By authority of the State of Missouri this petitioner did, on the first day of February, A. D. 1865, loan, execute, issue, and deliver to said Pacific Railroad bonds of this petitioner to the amount and value of $700,000, principal, payable twenty years after date, with interest at the rate of seven per cent. per annum, payable semi-annually, upon the express consideration and condition, duly accepted by said respondent, that it, said respondent, should provide

Petition in bankruptcy filed.

Alleged ground of bankruptcy.

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Alleged ground of bankruptcy.

for the payment of said principal sum at maturity, and that it, said respondent, in order to provide funds for the payment of said interest, should, every month after said bonds were issued, pay to this petitioner, to wit, into petitioner's treasury, out of the earnings of said respondent, four thousand dollars: but that said respondent has failed, and, although thereto by this petitioner often requested, has refused and still fails and refuses to pay said monthly amount due and payable for the months of June, July, August, and September of this year, 1875, to wit, upon the first days respectively of the months of July, August, September, and October of this year, and have wholly failed to make provision for the payment of said principal sum." The above petition was verified by the oath of H. Reichtein, as treasurer "and herein agent" of the county of St. Louis, and further verified by the oath of Chauncey F. Shultz, as presiding justice of the St. Louis county court. Said Shultz represented himself in said affidavit as being the
161 "agent herein of the petitioner" in the bankruptcy proceedings.

Verification of petition.

The Pacific Railroad filed an answer to the above-described petition in bankruptcy, on November eighth, 1875, and while denying that it was liable to be declared a bankrupt, made no denial that the county was an unsecured creditor for both its principal and interest in manner and form as averred in its petition. On May tenth, 1876, the petition to have the Pacific Railroad adjudged a bankrupt was referred by the court to the register in bankruptcy, to ascertain whether the petitioning creditor represented a sufficient amount in number and value of the creditors of the debtor to sustain the petition under the provisions of the act of Congress concerning bankruptcy. On May tenth, 1867, the petition was dismissed by the attorney of the county. On April third, 1876, this court make its decree in this cause, releasing the Pacific Railroad of the lease which had been made to the Atlantic and Pacific Railroad Company heretofore spoken of, and appointing separate receivers of the Pacific Railroad. In said decree the said receivers were directed to pay to the solicitor of St. Louis County the sum of $41,000, being the amount unpaid to the county for interest on its loan up to April first, 1876. The evidence discloses the fact to be that the order above named for the payment of the $41,000 was the result of an arrangement between the representatives of the county and the representatives of the parties concerned in the foreclosure suit, and was the inducement to, if not the exacted consideration for, the subsequent dismissal of the bankruptcy proceedings.

Action on said petition.

Determination of lease.

Order to pay $41,000.

On November sixteenth, 1875, the county of St. Louis filed in this case a petition verified by the oath of the presiding justice of the county court, and subscribed by its solicitors, in which it represented that it was a creditor of the Pacific Railroad in the sum of $720,000, and claimed the right to defend the suit in the protection of its interest.

Petition of county in "Littlefield case."

Thirty-fourth. That on the sixth day of June, 1876, a decree was entered in the principal case of George E.
162 Ketchum et al. vs. the Pacific Railroad et al., by

Sale of Pacific Railroad to fore-

close "3d mortgage."

which the third mortgage upon the Pacific Railroad, the terms of which are hereinbefore recited, was foreclosed, and in pursuance of which all the property embraced in said mortgage was, on the sixth day of September, 1876, sold by Seymour D. Thompson, esq., master in chancery; that on the twenty-fourth day of October, 1876, the said master, under and by virtue of the said decree of foreclosure and of a decree dated on the said twenty-fourth day of October, conveyed by deed all the property covered by said third mortgage to James Baker, esq., the purchaser thereof at said sale; that in said deed the provisions in said decree of foreclosure relating to the claim of St. Louis County here in controversy, that said county should not be prejudiced in any claim it might have by reason of the sale, was recited.

Property acquired by Pacific Railroad subsequent to loan of St. Louis County.

Thirty-fifth. That since May, 1865, the Pacific Railroad has purchased property to the amount of $2,600,000, of which sum $280,000 was paid for real estate, and the remainder was paid for rolling-stock for the company, all of which property was covered by the third mortgage, and has been conveyed by the deed above-mentioned made to James Baker; that the Southwest Branch, so called, was disposed of by the Pacific Railroad about March first, 1866; that the so-called Carondelet Branch was built either in or since the year 1872.

Property not included in "Third mortgage."

Thirty-sixth. That the receivers appointed in the principal suit have had control of a considerable property not included in the third mortgage, namely, leased railroad lines and leased rolling stock; that during the period of the receivership the receivers have expended about $700,000 more than they had received from the earnings of the road. This deficit has been made by the purchasers under the foreclosure sale made by this court; that the receivers have not any funds in their possession belonging to the Pacific Railroad.

Thirty-seventh. It does not appear that the county court of St. Louis County, while it was a stockholder in the
163 Pacific Railroad, actively participated in the business proceedings of the company, or was represented in its affairs. On March third, 1864, the county court instructed its presiding justice to attend a meeting of stockholders of the Pacific Railroad and cast the vote of St. Louis County stock in favor of accepting the provisions of an act of the general assembly of the State of Missouri, entitled, "An act for the extension and completion of the Pacific Railroad to the western boundary of the State at Kansas City, and the North Missouri Railroad to the Iowa State line; to complete the southwest branch of the Pacific Railroad, and to reduce the State indebtedness," approved February tenth, 1864.

Participation of county as stockholder in business of Pacific Railroad.

Voting county's stock.

On March twenty-eighth, 1864, the county court instructed its presiding justice to cast the vote of St. Louis County stock at the election that day to be held for directors of the Pacific Railroad. On March twenty-sixth, 1865, the county court ordered the presiding justice to cast the vote of the county stock in the Pacific Railroad for certain persons for

directors at an election to be that day held. On March twenty-seventh, 1866, the county court requested its presiding justice to cast the vote of the county's stock at an election to be that day held for certain persons referred to in the order for directors of the Pacific Railroad. On March twenty-fifth, 1867, the county court ordered the presiding justice to cast the vote of the county for directors of the Pacific Railroad "for those gentlemen who are opposed to the sale of the road unless the interest of the county of St. Louis is protected by the terms of sale." On March twenty-sixth, 1867, the county court appointed one of its justices to act on the part of the county as a member of a committee to examine into the financial and material condition of the Pacific Railroad, in accordance with the request previously made, namely, on March twenty-fifth, 1867, at a meeting of the stockholders of the Pacific Railroad. On March
164 thirtieth, 1868, the county court ordered its presiding justice to cast the vote of the county's stock for certain persons designated in this resolution as directors of the Pacific Railroad at the election that day held.

Earnings during receivership.

Thirty-eighth. The earnings of the Pacific Railroad have, during the time that it was in the hands of the receivers, and at present, averaged about $300,000 per month.

Respectfully submitted this 5th day of April, A. D. 1877.

SEYMOUR D. THOMPSON,
Master in Chancery.

165, 166 And afterwards, to wit, at said term of said circuit court, the following further proceedings were had in said cause on Wednesday, April 25, 1877, to wit:

GEORGE E. KETCHUM ET AL., COMPLAINANTS,
vs.
PACIFIC RAILROAD ET AL., DEFENDANTS.

In re intervening petition of St. Louis County.

This day come the said parties, by their solicitors, the said intervenor, by Messrs. Frank J. Bowman and Henry A. Clover, and the respondents by Messrs. Cline, Jamison & Day, and this cause having been set down for hearing on the finding of facts as reported by the master, and no exceptions being taken to said report, this cause is submitted to the court upon the facts so found, and the arguments and briefs of counsel; on consideration thereof, and being fully advised in the premises, it is ordered, adjudged and decreed, that the county of St. Louis is entitled to an equitable lien or charge upon the earnings of the said Pacific Railroad to whomsoever the same may be transferred or conveyed, prior and paramount to any mortgage or other lien thereon; that the earnings of said Pacific Railroad be and the same are hereby
167, 168 charged with a lien in the sum of four thousand dollars per month, payable monthly, from the first day of April, 1876, and the further sum of one thousand dollars, payable in each month of December, to meet the interest of seven hundred thousand dollars loaned by said county of St. Louis to the Pacific Railroad, on the 18th day of January, 1865, shall be fully paid off by the Pacific Railroad; the said equitable charge is hereby decreed to exist and be enforceable on said

earnings of said railroad property and franchises, against the funds in the hands of the receivers herein, and the purchaser under the mortgage sale heretofore ordered.

It is further ordered that the costs herein to be taxed be paid out of the fund in the registry of this court, to the credit of this cause, including a master's fee to Seymour D. Thompson of one thousand dollars.

And now the said respondents, by their solicitors, pray the court to grant them an appeal from the decree herein to the Supreme Court of the United States, which said appeal is allowed as herein prayed upon the said respondents giving an appeal bond in the sum of fifty thousand dollars, to be approved by the court, and that upon the filing
169 and approval of said bond a supersedeas be awarded staying further proceedings on the enforcement of said decree.

And afterwards, at said term of said circuit court, the following further proceedings were had in said case on Friday, May 4th, 1877, to wit:

GEORGE E. KETCHUM ET AL., COMPLAINANTS,
vs.
PACIFIC RAILROAD ET AL., DEFENDANTS.

In re intervening petition of St. Louis County.

This day come the respondents herein and present their bond for appeal in the sum of fifty thousand dollars, which bond is approved by the court, and ordered to be filed and made part of the record herein; and also present a citation citing and admonishing the said intervenor to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, which said citation is signed by the judge.

It is further ordered that the clerk of this court make out and certify a full and complete transcript of the record and proceedings here-
170 in to said Supreme Court of the United States.

The said bond is in words and figures following, to wit:

Know all men by these presents that we, Andrew Pierce, A. V. Stout, J. Seligman, Russell Sage, are held and firmly bound unto the county of St. Louis in the full and just sum of fifty thousand dollars, to be paid to the said county of St. Louis, its successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally by these presents, sealed with our seals, and dated this fourth day of May, in the year of our Lord one thousand eight hundred and seventy-seven.

Whereas lately, at the March term, 1877, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between George E. Ketchum and others, complainants, and the Pacific Railroad and others, defendants, a decree was rendered in favor of said county of St. Louis, an intervenor in said suit,
171, 172 declaring that the said county has a right to have the earnings applied to pay the interest on its bonds, as provided in the second section of the act of January 7th, 1855, and that this charge attaches to the property sold under the decree of foreclosure in said case, and giving other relief as in said decree recited and contained; and the following parties, the respondents to the petition of said county of St. Louis, intervenor as aforesaid, to wit, George E. Ketchum, James Seligman, Thomas W. Pierce, the Atlantic and Pacific Railroad Company, Uriel Murdock, Luther C. Clark, James D. Fish, Henry F. Vail, Edwin

D. Morgan, Jesse Seligman, and James Baker, having obtained an appeal from the said court to the Supreme Court of the United States, to reverse the decree in the aforesaid suit:

Now the condition of the above obligation is such that if the said appellants shall prosecute the said appeal to effect, and answer all damages and costs if they shall fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

ANDREW PIERCE. [SEAL.]
A. V. STOUT. [SEAL.]
173, 174 J. SELIGMAN. [SEAL.]
RUSSEL SAGE. [SEAL.]

Signed and delivered by Andrew Pierce, in presence of Melville C. Day.

STATE OF NEW YORK,
City & County of New York, ss:

On this first day of May, A. D. 1877, before me, Thomas B. Clifford, a commissioner of deeds for the State of Missouri, residing in New York City, personally came the above-named J. Seligman, Russell Sage, and A. V. Stout, each to me known, who, being by me duly sworn, each for himself says that is worth more than fifty thousand dollars over and above his just debts and liabilities in real estate and property exempt from execution; and they further, each for himself, severally acknowledged that he executed the same freely and for the purposes therein mentioned.

Witness my hand and official seal this first day of May, 1877.

[SEAL] THOS. B. CLIFFORD,
Commissioner of Deeds for the State of Missouri, residing in the city of New York.

Approved by—

SAMUEL TREAT, *Judge.*

175, 176 On overruling the demurrer to the intervening petition the circuit judge gave the following opinion:

KETCHUM ET AL.
vs.
PACIFIC RAILROAD ET AL.

United States circuit court, eastern district of Missouri, September term, 1876.

1. Case in judgment; lien of county. In 1851, while the State of Missouri was in full possession of the revenues of the defendants' road upon certain express trusts, which it was provided were to continue until the State bonds loaned to the company were paid or exchanged, by an act of January 7, 1865, the county of St. Louis was empowered to loan said company its bonds, which was done and accepted by the company. Section 2 of said act authorized the person who had theretofore been in custody of the earnings of the road, for the State (called a fund commissioner), to pay into the county treasury, out of said earnings, a sum sufficient to meet the interest on said bonds loaned by said county as it accrued. Held that by said act the State waived its lien and right to all the earnings of the company to the
177, 178 extent of the sum required to pay the interest on said bonds, and that the county was pro *tanto* substituted as to that amount

in the place of the State, with a lien or charge to that extent as effectual as the State before possessed.

2. Effect of act as between the company and the county. As between the company and the county, the effect of the acceptance of the act, and the issue of the bonds by the county under it, was to convert the provisions of the second section into a contract, by which the company consented that the fund commissioner, or his successor, should out of the earnings of the railroad pay the sum necessary to meet the interest on said bonds, until they were paid by the company. This created a lien, statutable in its origin and equitable in its nature, on those earnings as they arise, which may be enforced by the county, so long as the bonds which it loaned to the company remain unpaid.

3. General rule of equity as to equitable liens. If a debtor by a concluded agreement with a creditor sets apart a specific amount of a specific fund in the hands, or to come into the hands of an-
179, 180 other from a designated source, and directs such person to pay it to the creditor, which he assents to do, this is a specific appropriation, binding upon the parties, and upon all persons with notice, who subsequently claim an interest in the fund under the debtor.

4. Mortgagees; charged with notice. The mortgagees under a mortgage made subsequent to the acts of 1865 and 1868, authorizing the lien or charge, and noting the facts that the county had made the loan, and that it was unpaid, are charged with notice of all the act contain.

Petition by the county of St. Louis to establish a lien or charge on the fund in court.

A general demurrer to the petition was submitted.

Mr. Bowman, Mr. Garesche, and Mr. Clover, for the county.

Mr. Broadhead, Mr. Litton, and Mr. Baker, for the mortgagees.

DILLON, circuit judge:

Under the authority of the act of January 7, 1865, the county of St. Louis issued and loaned to the Pacific Railroad its twenty years'
181, 182 seven per cent. bonds to the amount of $700,000. The railroad company agreed to pay the interest on the said bonds as it fell due, and at maturity to pay the principal. The principal is not yet due, but until the recent embarrassment of the company, it has regularly paid to the county the amount required to meet the interest on the bonds. In 1868 the company made a first mortgage of its property and franchises to trustees, to secure a loan of $7,000,000, and in 1871, a second mortgage to secure a further loan of $3,000,000. Subsequently, in 1875, it made a third mortgage, which is the one herein sought to be foreclosed, and in respect of which a decree of foreclosure has been passed, subject to the first and second mortgages, and reserving all the rights of the county of St. Louis. The first and second mortgages are not before the court on the present application, but the application is resisted by the third mortgagees, between whom and the county of St. Louis the present controversy exists.

The point of the contest is this: the county claims that it is entitled to a lien or equitable charge upon the earnings of the railroad company to the extent necessary to pay the interest on the $700,000 loan,
183, 184 and to continue until the bonds of the county are paid by the railroad company or the purchasers of the property and franchises thereof, under the decree of foreclosure, and that the lien or charge specifically attaches to the earnings of the road and follows the

road into whosesoever hands it may pass. On the other hand, the mortgagees maintain that obligation of the railroad company to the county is unsecured; that it is a debt at large—or at all events that the right of the county is subordinate to the rights of the mortgagees and of the purchaser at the foreclosure sale. The question has been very fully and ably argued at the bar, and, as the result of that argument, has led us both to a clear conviction. We proceed to state our conclusion and, briefly, the grounds upon which it rests.

The determination of the point in issue must depend upon the intention of the legislature and of the parties in interest at the time, 1875, when the county made the loan. These parties mainly were then the State (which sustained at that time the double relation of sovereign and creditor towards the railroad company), the railroad company, and the county of St. Louis. The intention of the parties must be gathered from the language of the act of January 7, 1865, and the resolu-
185, 186 tions and acts of the company and the county in executing the authority it conferred, these being viewed in the light reflected upon them by the known circumstances surrounding the parties and the object which was intended to be accomplished.

To these intrinsic circumstances, shown in the legislative history of the road, the briefest reference only will be made. In 1849, the legislature chartered the Pacific Railroad Co., with power to build a line of railway nearly three hundred miles long, from St. Louis to Kansas City. In 1851, the work of construction commenced, and in that year, and down to 1855, the legislature had passed acts loaning the credit of the State to the company to aid and secure the completion of the road. This aid was in the shape of State bonds, having not less than twenty or thirty years to run from the date of their issue.

The company agreed to make provision for the payment of these bonds, interest and principal, and the State was secured by a statutable lien with power of sale. Down to and during 1855, $7,000,000 of State bonds had been issued. Down to 1861, when the rebellion broke out, only about 180 miles of the road had been completed. The
187, 188 civil war suspended the work of constructing the road, nor was the work resumed until the legislature passed the act of February 10, 1864 (Laws 1864, p. 50), which has a material bearing upon the present controversy. This act authorized the company to borrow $1,500,000, to complete the road, to be secured by a first lien on the line west of Dresden, the State waiving for this purpose and to this extent its prior lien. The money was obtained, and while the company was extending its road in 1864, the road was "raided" by the insurgent forces, and further aid was needed both to repair the injuries and to complete the line.

The act of February 10, 1864, contains provisions in respect to the fund commissioner, who is referred to in the act of January 7, 1865, which it is essential to notice. The office of fund commissioner was created by the act of 1864, which provided that the office "shall continue until the bonds (i. e. the Dresden bonds, so called), issued for the completion of the road, 'and the State bonds loaned to the said company,' with interest thereon, are fully paid or exchanged for the first-mortgage bonds of said road, as hereinafter provided."

"SEC. 2. All gross earnings of the road, from all sources of
189, 190 revenue, shall be under his control and possession as they arise."

SEC. 3. This officer was to pay out all moneys for construction and equipment and for operating the road. The duty of this officer in the

application of the net earnings of the road is prescribed by section 7, as follows: 1, his salary; 2, interest of first-mortgage bonds exchanged under the act; 3, dividend on the preferred stock, which the act authorized to be created, and the surplus to the purchase of outstanding State bonds. The State was thus, in 1864, in full possession of all the revenues of the company upon certain express trusts, and this possession it was contemplated and provided should continue "until the State bonds loaned to the railroad company," having still many years to run, and upon which the Pacific Railroad Company had paid no interest since July, 1859, were paid or exchanged. It may be implied from the legislation of March 31, 1868, hereafter adverted to, that the holders of State bonds did not exchange them for bonds of the company under section 6, nor convert them into preferred stock under section 8, of the act of February 10, 1864.

Now, in this condition of affairs—the State by its fund commissioner, in possession for its own security of all the revenues of the road
191, 192 —the road without credit and in ruinous condition, and its line uncompleted, the funds derived from the Dresden bonds exhausted, and further aid being necessary, the act of January 7, 1865, was passed, the object of which was to secure the needed assistance by the loan to the company of the credit of St. Louis County to the extent of $700,000. Section one of the act last named authorized, but did not require, the county court to loan the company its 7 per cent. twenty-years bonds "for the completion of the road," upon such conditions as the county court and the directors of the company might agree upon, subject of course to the provisions of the act itself. The county court accepted the act. The board of directors of the company likewise accepted it, and agreed to observe and faithfully perform its obligations, and soon afterwards the bonds of the county were issued and the proceeds used by the company to complete its road. The road was finished the following year, and the interest on the bonds has been paid by the company to the county down to and including May, 1875. What provision was made to secure the county for this large loan to the
193, 194 company?

It was not a gift or donation by the county. It was not a purchase by the county of the stock of the road. The act only authorized the county to loan its credit or bonds to the company. The company was, as we have seen, in no condition to meet the interest on the bonds, unless the provisions in the act of 1864, for the sequestration of its revenue by the State, and for the benefit of the State, were modified.

Hence, we see the object and necessity for the second section of the act of January 7, 1865. It can hardly be supposed that the county would loan this large sum to a company whose property was already mortgaged to the extent of near or over ten millions of dollars, including unpaid interest, and all whose revenues were appropriated and actually going into the possession of the State, and were to continue to go there until the large debt of the State was paid. Accordingly, we find that the second section of the act made, and was intended to make, effectual provision for the security of the county. That section is as follows:

"SEC. 2. The fund commissioner of the Pacific Railroad, or such person as may at any time thereafter have the custody of the funds
195, 196 of said railroad company, shall every month after said bonds are issued pay into the county treasury of St. Louis County, out of the earnings of the Pacific Railroad Company, $4,000, and $1,000 additional in each month of December, to meet the interest on said 700

bonds—said payment to continue until said bonds are paid off by the Pacific Railroad."

Now, the effect of this section, when accepted and acted upon by the county and company, was simply this: Before this the State had a complete and perfect lien upon and right to receive all the earnings of the company; it impliedly consented to waive its lien and right to receive all the earnings in favor of the county to the extent of $700,000; and the county was pro tanto substituted as to the $49,000 per year in the place of the State, with a lien or charge to that extent as effectual as the State before possessed. Why is this not the effect of what was done?

The principal parties in interest in this transaction were the State, the Pacific Railroad, and the county, and they all agreed to the arrangement.

As respects the State, the effect of the acceptance of this act by the company and the county was, that the State consented to waive
197, 198 in favor of the county its prior right to the $49,000 per year out of the earnings of the company. As between the company and the county, the effect of the acceptance of the act and this issue of the bonds by the county under it, was to convert the provisions of the second section into a contract, by which the company consented that the fund commissioner, who had the right to receive all its funds, or any other person who should at any time thereafter have the custody of its funds, should every month, out of the earnings of the railroad, pay the specified sum necessary to meet the interest on the bonds, which payment it was provided should continue until said bonds were fully paid by the railroad company.

Unless something has since changed the rights and relations of the company and the county, it seems almost too clear for argument that this constituted a specific appropriation of the company, with the consent of the State, of $49,000 per year of the earnings of the company, in the hands of a trustee, in favor of the county. If the fund commissioner was still "in esse," and in receipt of the earnings of the road, can it be doubted that at
199, 200 the instance of the county he could be compelled by mandamus or other proper proceeding to pay the specified sum each month into the county treasury. Here was a consummated contract. The fund out of which the payment was to be made, the amount, the place and purpose of the payment, were all definitely fixed, and the duty of making the payment was absolutely declared. It is certain there was no change in the relation of the parties down to the act of March 31, 1868, by virtue of which the Pacific Railroad, in consideration of $5,000,000 paid to the State, procured a release for all existing claims, title and interest of the State in and to the Pacific Railroad and its property. The effect of the act, in this regard, has been authoritatively settled in the case of Murdock v. Woodson, 2 Dillon, 188, S. C. on appeal, 22 Wall., 351. It is not necessary to state more at large to what is there decided. It is only material here to notice that the act of 1868 recites the existence of the debt to St. Louis County, and makes provision for the payment in case the road should be sold. But if it should not be sold, and if the provisions of the fifth section of the
201, 202 act should be accepted by the company, as turned out to be the case, then the company remained in esse, and the owner of its property and franchises, and no further provision than then existed for St. Louis County was necessary.

As the act of 1868 made provision for closing the relations of the State as a creditor of the company, it abolished the office of fund commissioner (sec. 12). It has been contended in argument by the counsel

for the mortgagees that the effect of the repeal of this office was to terminate any trust which the second section of the act may have created in favor of the county; but there is a satisfactory answer to that position, even if the legislative power over the rights of the county be as absolute and unlimited as claimed by the counsel. In the legislation of 1868, the general assembly, so far from evincing an intention to impair or destroy the rights of the county, whenever it made any provision in that regard it was one recognizing and intended to secure and protect those rights. Besides, the contingency of the repeal of the office of fund commissioner was anticipated in the second section of the act authorizing the loan by the county to the company, and pro-
203, 204 vision was made that, in that event, the duty which had before been devolved on that officer should ipso facto devolve "upon such person as might at any time thereafter have the custody of the funds of the railroad company."

It is our judgment that the effect of the agreement of the company with the county to specifically appropriate its earnings as provided by the second section of the act of 1865 is to create a lien or charge statutable in its origin and equitable in its nature on those earnings as they arise, which may be enforced by the county so long as the bonds which it loaned to the company remain unpaid. This was the view expressed by Mr. Leighton, the attorney of the company at the time, as shown by his letter of January 10, 1865, and his opinion is unquestionably a sound exposition of the purpose and effect of the act.

It is not necessary to go into the general learning on the subject of equitable liens or charges, since the rights of the parties, in the case before us, essentially depend upon the construction of the act of 1865. But the accepted doctrine of courts of equity, as respect to
205, 206 equitable liens or charges, will be found, we think, to support the conclusion we have reached. The cases clearly establish this legal proposition. If a debtor by a concluded agreement with a creditor sets apart a specific amount of a specific fund in the hands or to come into the hands of another from a designated source, and directs such person to pay it to the creditor, which he assents to do, this is a specific appropriation binding upon the parties and upon all persons with notice who subsequently claim an interest in the fund under the debtor. This proposition would sustain the right of the county in the present case.

It is urged, however, that the mortgagees under the third mortgage had no notice of the rights of the county. But they are bound to notice the acts of the legislature of 1865 and 1868—the one authorizing the lien or charge, and the other recites the facts that the county has made the loan, and that it was then unpaid. As the mortgage was made subsequent to both of these acts, the mortgagees are charged with notice of all that they contain.

Demurrer overruled, with leave to answer.

207, 208 The circuit judge gave the following opinion on the final hearing of the case:

United States circuit court, eastern district of Missouri, March term, 1877.

GEORGE E. KETCHUM ET AL.
v.
PACIFIC RAILROAD ET AL.

In re intervening petition of St. Louis County.

DILLON, circuit judge:

Since the demurrer to the petition of the county was determined, the adverse parties in interest have answered, a reply has been filed and proofs taken. The facts as reported by the master have been accepted by both parties as correct, and upon the question whether under the legislation applicable to this transaction, and upon these facts, the county has an equitable lien or charge upon the property sold under the decree, or upon the "earnings" of the railroad which was thus sold (all rights of the county having been fully reserved in the decree), elaborate arguments were filed at a late day in the term, too late to allow opportunity for extended examination or deliberate reflection.

209, 210 As our judgment will not be conclusive, and will not be accepted as such by the parties, it is, perhaps, of little consequence what that judgment may be.

We rest it upon what seems to be the manifest and undoubted intrinsic equities arising out of the legislation and peculiar circumstances of the case, without a very close and thorough examination as to whether there are legal obstacles in the way of recognizing and giving effect to these equities.

Upon consideration of the demurrer, we held that the effect of the legislation of the State applicable to this transaction, and the acts and contracts of the parties, was to give to the county a lien statutable in its origin and equitable in its nature upon the "earnings" of the railroad, and upon the road and franchises of the company, as (so to phrase it) the mother of the earnings. We refer to our opinion at that time for a more full expression of our views.

Aside from this and on general principles, if the doctrine laid down by Lord Chancellor Thurlow in Legard v. Hodges, 3 Brown Chancery Reports, 531, 538, "that where parties came to an agreement

211, 212 as to the produce of land, that the land itself will be affected by the agreement,' and equity will specifically enforce the agreement against the party who makes it and all persons with notice; if this doctrine is sound to the extent stated and applied in that case (see same case, 4 ib., 421), the county is entitled to have the earnings arising from the property specifically applied as provided in the second section of the act of January 7, 1865. It would become a lien or charge upon the earnings and the road out of which the earnings must necessarily come, effectual against the company and subsequent mortgagees and purchasers with notice (2 Story, Eq. Jurisp., sec. 1231).

Whether the county acquired such a lien; and, if so, whether it would take precedence of the rights of the subsequent mortgagees or be liable to be defeated by a sale under a decree foreclosing such mortgages, are close and difficult questions, and, as above remarked, our judgment is given in favor of the county at this time that the final

213, 214 disposition of the question may not be delayed, and in accordance with what appears to us to be the equities of the case, without being able in the pressure of other business to examine the

question, in the light of the facts presented in the report, with that care and deliberation which we would be glad to do if it were practicable.

Let an order or decree be entered declaring that the county has a right to have the earnings of the company appropriated to pay the interest on its bonds as provided in the second section of the act of January 7, 1865, and that this charge attaches to the property sold under the decree of foreclosure.

Treat, J., concurs.
Decree accordingly.

Mr. Bowman and Mr. Clover for the county.
Cline, Jamison & Day, contra.

215 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true and complete transcript of the record and proceedings in the matter of the intervening petition of St. Louis County in case No. 703, of George E. Ketchum et al., plaintiffs, against The Pacific Railroad et al., defendants, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court at office in the city of St. Louis, in said district, this sixteenth day of June, in the year of our Lord eighteen hundred and seventy-seven.

M. M. PRICE,
Clerk of said Court,
By A. P. SELBY,
Deputy.

(Indorsement on cover:) No. 162. Geo. E. Ketchum, James Seligman, Thomas W. Price, The Atlantic & Pacific Railroad Co. et al, appellants, vs. The County of St. Louis, intervenor. E. Missouri C. C. U. S. Filed 7th August, 1877.

IN THE

Supreme Court of the United States.

CASE No. 162.

GEO. E. KETCHUM, JAMES SELIGMAN, THE ATLANTIC & PACIFIC RAILROAD, ET AL.,

Appellants,

vs.

THE COUNTY OF ST. LOUIS,

Intervenor.

STATEMENT OF THE CASE AND BRIEF.

JAMES O. BROADHEAD,

Solicitor for Appellants.

John J. Daly & Co., Printers, 213 North Third Street, St. Louis.

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STATEMENT OF THE CASE.

In the suit of George E. Ketchum v. The "Pacific Railroad," brought to foreclose the third mortgage upon the property of the Company for $4,000,000, the County of St. Louis filed its intervening petition claiming a statutory lien upon the property of the Railroad Company to secure the payment of $700,000 and interest, being the amount of certain bonds issued by the County of St. Louis, and loaned to said Railroad Company to aid in the completion of its road.

The act of the legislature under which the County of St.

Louis was authorized to make this loan, was approved January 7th, 1865, and contains but two sections, as follows:

"SECTION 1. The County of St. Louis is hereby authorized to issue seven hundred county bonds of the denomination of one thousand dollars each, having twenty years to run, and bearing interest at the rate of seven per cent. per annum, payable semi-annually, the principal and interest payable in the city of New York, and loan said bonds to the Pacific Railroad Company for the completion of said road; said bonds to be issued under such conditions as may be agreed upon between said County Court and the board of directors of the Pacific Railroad Company, such conditions to be binding on the parties, but shall not impair or effect the validity of the bonds after they are issued.

"SEC. 2. The fund commissioner of the Pacific Railroad, or such person as may at any time hereafter have the custody of the funds of said railroad company, shall, every month after said bonds are issued, pay into the county treasury of St. Louis County, out of the earnings of said Pacific Railroad, four thousand dollars, and one thousand dollars additional in each month of December, to meet the interest on the said seven hundred bonds; said payments to continue until the said bonds are paid off by the Pacific Railroad."

The bonds, it will be perceived, were to be issued under such conditions as might be agreed upon, between the County Court and the board of directors of the Pacific Railroad, and the fund commissioner of the road (or such person as may hereafter have the custody of the funds of the company), who, under the act of 1864 had charge of the earnings of the road, as will hereafter be shown, was to pay out of the

earnings of the road an amount sufficient to meet the *interest* on the seven hundred bonds, the payments (of interest) to continue until the bonds are paid off.

To explain the office and duties of fund commissioner it is necessary to refer briefly to the legislation of the State of Missouri in regard to the Pacific Railroad.

The company was chartered in 1849, with power to build a road from St. Louis to the western boundary of the State, and by an amendment Kansas City was made the western terminus of the road.

The legislature passed various acts loaning the credit of the State to the company to aid in building the road. Down to 1861, when the rebellion broke out, only about one hundred and eighty miles of the road had been completed, and at that time $7,000,000 of State bonds had been issued and delivered to the company, for which the State held a first lien upon the whole road and its property. The civil war suspended the work of construction, which was not resumed until 1864, and after the passage of the act of Feb. 10th, 1864 (see Laws of Adjourned Session of 1863–4, p. 50).

The larger portion of the bonds issued by the State for the benefit of the road were issued under the acts of December 10th, 1855, and March 3d, 1857, (see as to last act Adjourned Sess. of 1857, p. 59) and matured thirty years after their dates. The bonds of the State issued in 1857, under the act of 1857, would not mature until after the maturity of the St. Louis County bonds, which were issued in 1865, and matured in twenty years.

The act of February 10, 1864, above referred to, was the act by which the office of Fund Commissioner was created. At the time of the passage of this act the road was uncom-

pleted, work upon it was suspended, and the company was in default to the State for the non-payment of the interest on the $700,000 of bonds loaned to it by the State.

By the first section of the act of February 10, 1864 (see laws of adjourned session of 1863-4, p. 50), the company was authorized to borrow $1,500,000 by the issue of its bonds, running four, five and six years, to be secured by mortgage on the main line of the road west of Dresden; and for that purpose the State relinquished her first lien and mortgage on the road west of Dresden, retaining a second lien or mortgage thereon. By this first section it was also provided, that the net profits of the road should be applied to its extension and equipment until completed, reserving, however, sufficient for the payment of interest on the bonds, and containing other provisions not necessary to mention.

The second section of the act of 1864, provided for the creation of the office of Fund Commissioner, declaring that "The office of Fund Commissioner is hereby created, and shall continue until the bonds issued for the completion of the road, and the said State bonds loaned to said railroad company, with interest thereon, are fully paid out of the earnings, or exchanged for the first mortgage bonds of the road," as provided for by the act.

By the third section of the act, the railroad company was required to deliver to the Fund Commissioner, the bonds of the company authorized to be issued to the amount aforesaid. The Fund Commissioner was thereupon required to negotiate the bonds, subject to the approval of the Governor and the president of the Railroad Company, the proceeds to be deposited in a certain bank, subject to the draft of the

Fund Commissioner, for the purpose of the completion and equipment of the road. This section then provides that:

"All gross earnings of the road from all sources shall be paid in daily to the Fund Commissioner, and all other sources of revenue, belonging to or connected with said railroad, shall be under his control, and be taken into his psssession as they arise."

The fourth section provides as follows: "§ 4. Said Fund Commissioner shall, out of all moneys arising from the sale of bonds as aforesaid, upon proper vouchers, pay for the construction of the extension and equipment of said road as aforesaid; and out of all moneys derived from other sources, as before designated, in his hands and under his control, upon proper vouchers and receipts, he shall pay for the operating of the road; the payment of said construction and equipment shall be made upon the vouchers of the chief engineer, approved and countersigned by the president, specify in proper detail the amount and character thereof; and the payment for operating the road shall be made upon the vouchers and certificates of the superintendent of the road, approved by the president and chief engineer."

The sixth section authorized the company to issue first mortgage bonds to the amount of the State bonds loaned to the road, to have the effect of first mortgage bonds only to the extent of their exchange for State bonds.

Section seven provides as follows: "§ 7. It shall be the duty of the Fund Commissioner to apply the net earnings of the road, after paying the expenses of his salary, *first*, as provided in section one; *second*, to the payment of interest as the same shall become due and payable on the first mortgage bonds issued and exchanged as provided in section six,

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Fund Commissioner, for the purpose of the completion and equipment of the road. This section then provides that:

"All gross earnings of the road from all sources shall be paid in daily to the Fund Commissioner, and all other sources of revenue, belonging to or connected with said railroad, shall be under his control, and be taken into his psssession as they arise."

The fourth section provides as follows: "§ 4. Said Fund Commissioner shall, out of all moneys arising from the sale of bonds as aforesaid, upon proper vouchers, pay for the construction of the extension and equipment of said road as aforesaid; and out of all moneys derived from other sources, as before designated, in his hands and under his control, upon proper vouchers and receipts, he shall pay for the operating of the road; the payment of said construction and equipment shall be made upon the vouchers of the chief engineer, approved and countersigned by the president, specify in proper detail the amount and character thereof; and the payment for operating the road shall be made upon the vouchers and certificates of the superintendent of the road, approved by the president and chief engineer."

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Section seven provides as follows: "§ 7. It shall be the duty of the Fund Commissioner to apply the net earnings of the road, after paying the expenses of his salary, *first*, as provided in section one; *second*, to the payment of interest as the same shall become due and payable on the first mortgage bonds issued and exchanged as provided in section six,

and *next*, not to exceed six per centum, dividend on the preferred stock, as provided in section eight, and the surplus, if any, to the purchase of the outstanding State bonds, with interest coupons thereon, at the best market rates."

This act of February 10th, 1864, was duly accepted by the stockholders of the company at a stockholders' meeting, held for that purpose.

The General Assembly of Missouri, by an act approved March 1st, 1868, entitled "An act for the sale of the Pacific Railroad, and to foreclose the State's lien thereon, and to amend the charter thereof," by its first section provided, that the Governor was directed to sell the Pacific Railroad and its appurtenances, in accordance with the provisions of former acts, by which the State secured a lien upon the road and its appurtenances, to secure the payment of the bonds issued for its construction. The fifth section of this act of 1868 provided as follows:

"§ 5. If the Pacific Railroad shall, at any time within ninety days after the first day of April, 1868, pay into the treasury of the State the sum of $350,000 in bonds of this State, or in money, then, and in that event, the Governor shall not advertise said road for sale; and if the company shall, within ninety days thereafter, pay into the State treasury an additional sum equal to $5,000,000 in all (the same being either in cash or Missouri State bonds), the Governor shall, upon the production of the receipts of the State Treasurer for said amounts, execute and deliver to the Pacific Railroad Company a deed of release for all claims, title and interest which the State of Missouri has in and to the said Pacific Railroad, its property and appurtenances; and the said Pacific Railroad Company shall, from and after the de-

livery of said deed, be fully discharged from all claims or debts due the State, and all liability growing out of the issue of the bonds of the State to aid in the construction of said road, and no sale shall, in any event, take place under this act."

The money provided to be paid by this section, was paid in pursuance of its provisions, and the Governor of the State did execute and deliver to the Pacific Railroad Company a deed of release for all claims, title and interest which the State of Missouri had in and to the Pacific Railroad, its property and appurtenances. This action of the Governor was passed in review by this Court in the case of Woodson v. Murdock, 22 Wall., p. 351, and approved by the judgment of this Court in that case. By the sixth section of the act of March 31, 1868, above referred to, it is provided:

"§ 6. In case of a sale of said road under the provisions of sections one, two, three and four of this act, the State of Missouri shall assume the payment of the principal and interest due on seven hundred thousand dollars in bonds issued by the county of St. Louis as a loan to the Pacific Railroad Company, under the act of January 7, 1865, and also the floating debt of said company existing at the time of the passage of this act, not to exceed the amount of six hundred and fifty thousand dollars."

The foregoing is all the legislation on the subject deemed material to the determination of the question before the Court in this case.

It will be perceived that the first section of the act of January 7th, 1865, under which the bonds in question were issued, provides that they shall be issued "under such conditions as may be agreed upon between the said County Court

and the board of directors of the Pacific Railroad Company, such conditions to be binding on the parties."

What were the conditions agreed upon between the parties?

Immediately after the passage of the act, the County Court of St. Louis County submitted to their regular counselor, H. A. Clover, Esq., various questions in regard to the force and effect of the act of January 7, 1865, his answer, of the date of January 14, 1875, is found at p. 67, of the printed record in this case. Amongst other things, he says:

"The first matter which strikes my mind, is, that no provision whatever is made for the payment of the bonds themselves, or as to how or out of what funds they are to be paid, or what security is offered beyond the responsibility of the railroad for their payment when due."

And he closes his communication by saying:

"You ask, in conclusion, what steps will be necessary to make the act, if accepted by the court, binding upon the Pacific Railroad?

"To which I can hardly make reply; the act, if acceptable to the County Court, is binding upon the Pacific Railroad, but how binding the obligation may be is a different question. I suppose if the bonds are issued and loaned the ultimate dependence for their payment, principal and interest, lies in the responsibility of the company, present and future, in its ability to pay; if it is able it can be compelled to; otherwise, of course not."

Thereafter, on the eighteenth day of January, 1865, an order was adopted by the said County Court of St. Louis County, in words and figures following, to-wit: (See p. 70 of the printed record.)

STATE OF MISSOURI, }
COUNTY OF ST. LOUIS. } ss.

In the County Court of St. Louis County, January Term, 1865.

WEDNESDAY, January 18th, 1865.

ORDERED BY THE COURT:

The provisions of an act of the General Assembly of the State, entitled, an act authorizing the county of St. Louis to issue bonds, approved January 7th, 1865, is hereby by the county of St. Louis accepted, and upon the passage of a resolution by the board of directors of the Pacific Railroad, binding them likewise to the provisions of said act, an issue of bonds of the county to the number of seven hundred, each of the denomination of one thousand dollars, having twenty years to run, and bearing interest at the rate of seven per cent. per annum, payable in the city of New York semi-annually, is hereby ordered, which are to be delivered to and loaned by the county to the Pacific Railroad for the completion of said road. And the Pacific Railroad is likewise required by the action of its board and authorities to assume the prompt payment of said bonds at their maturity, so that the same may constitute a legal indebtedness on the part of said Pacific Railroad to the county of St. Louis for the bonds hereby ordered to be issued and loaned. The said bonds are to be sold on such terms as this court or its presiding officer may agree upon.

Whereupon Mr. Justice Fisse proposed the following amendment, to-wit:

"But no bond shall be issued until the question has been first submitted to the qualified voters of St. Louis county

for their acceptance or rejection, at a special election to be held for that purpose on the first Monday in February next, and the majority of the votes then cast shall be in favor of issuing said bonds as above stipulated."

Which amendment the court refused to adopt by the following vote: For the amendment, Justices Alt, Fisse and James; against the order, Justices Able, Charles, Yore, and Taussig.

Whereupon the court adopted the order submitted by the committee as aforesaid, by the following vote, and declared to be the order of this court: In favor of the order, Justices Able, Charles, Yore, and Taussig; against the order, Justices Alt, Fisse, and James.

And, thereafter, on the nineteenth day of January, 1865, the board of directors of the Pacific Railroad passed a resolution in words and figures following, to-wit:

OFFICE OF THE PACIFIC RAILROAD,
ST. LOUIS, January 19th, 1865.

At a meeting of the board of directors of the Pacific Railroad held this day at their office in the city of St. Louis, the following resolution was adopted.

Resolved, That the board of directors of the Pacific Railroad unanimously accept the terms, provisions, and obligations set forth and contained in an act of the General Assembly of the State of Missouri, entitled, "An Act authorizing the county of St. Louis to issue bonds," approved January 7, 1865, to be observed and faithfully performed by this company, and that the president be and he is hereby instructed to execute an agreement, under the seal of the com-

pany, obligating the said company to promptly pay, at maturity, the said bonds authorized to be issued by said act.

Resolved further, That this company accept of the terms and provisions of an order of said County Court, now here present and certified by the clerk of said court under its seal, and hereby obligate the company to an observance and faithful performance of all the provisions contained therein.

I, John C. Porter, Secretary of the Pacific Railroad, hereby certify that the preceding is a true copy of the resolution adopted by the board of directors of the company, as the same appears upon the records of said railroad.

In testimony whereof, I have hereunto set my hand and affixed the corporate seal of said Pacific Railroad.

[SEAL] JOHN C. PORTER,
Secretary Pacific R. R.

That said resolution was, on the 24th day of January, 1865, transmitted by the president of the Pacific Railroad to the said County Court, in a letter in which he, the said president, used the following language: "I shall be at all times ready to execute on behalf of this company such instruments of writing as shall be necessary to perfect the orders of your honorable court and this company in the premises;" that the said resolution was on the 26th day of January, 1865, filed among the records of the said County Court, and referred to the committee on the Pacific Railroad and the county counselor, with instructions to report articles of agreement between the county and said railroad company relative to the bonds therein mentioned.

And thereafter, on the 30th day of January, 1865, the county counselor of said St. Louis County, H. A. Clover,

Esq., addressed to the said County Court a letter containing the following language:

ST. LOUIS, MO., January 30th, 1865.

To the Hon. County Court of St. Louis County:

GENTLEMEN: In my opinion nothing further is needed to bind the Pacific Railroad in the matter of loan of seven hundred of the bonds of the county to said company for the completion of said road. The resolution of the company of the 19th inst., obligates it to an observance and faithful performance of the provisions of the order of the court of 18th inst., for the prompt payment of said bonds at their maturity. Respectfully, etc.,

H. A. CLOVER.

Which communication was concurred in by a committee of the said court composed of Justices William Taussig, Benjamin Charles and John E. Yore, and which report the court did by an order then and there made and entered of record, approve.

By the testimony of Wm. Taussig, found at p. 72 of the record, it appears that the county court was waited on by a "very large delegation of citizens" who urged the issuing of the bonds in the interest of the public, that it was deemed impracticable for the county to obtain an absolute security for the bonds.

After the issue of the bonds in question by the County Court of St. Louis County, and the relinquishment of the indebtedness of the company to the State, under the provisions of the act of 1868, various mortgages were placed

upon the property of the company, the last being the third mortgage for $4,000,000 of the date of July 10th, 1875, under the provisions of which the property was sold, and the county of St. Louis claims a lien upon the proceeds of the sale. The judgment of the court below was that the county of St. Louis is entitled to an equitable lien or charge upon the earnings of the Pacific Railroad, to whomsoever the same may be transferred or conveyed, paramount to any other mortgage or lien thereon — that the earnings of the road be charged with a lien in the sum of four thousand dollars per month, and the further sum of $1,000 payable in each month of December, to meet the interest of $700,000 loaned by the County of St. Louis to the Pacific Railroad on the 18th of January, 1865, till the same shall be fully paid off by the Pacific Railroad — and that the said equitable charge is decreed to exist and be enforceable on the earnings of the said railroad property and franchises, against the funds in the hands of the receivers herein, and the purchaser under the mortgage sale heretofore ordered.

From which decree an appeal was taken to this court.

ERRORS ASSIGNED.

1. The court erred in rendering the decree in this cause in favor of the intervenor, the County of St. Louis.

2. And the court erred particularly in holding that the said County of St. Louis had a lien, either statutory or equitable, upon the earnings or property of the Pacific Railroad prior or paramount to any mortgage or lien thereon, and that the same is a charge upon said earnings and against the funds in the hands of the receivers of the road, and against the purchaser under the mortgage sale ordered by the court.

BRIEF.

Judge Dillon, in delivering the opinion of the Circuit Court in this case (see p. 89 of the printed transcript) says:

"Whether the county acquired a lien; and if so, whether it would take precedence of the rights of subsequent mortgages, or be liable to be defeated by a sale under a decree foreclosing such mortgages, are close and difficult questions, and as above remarked, our judgment is given in favor of the county at this time, that the final disposition of the question may not be delayed, and in accordance with what appears to us to be the equities of the case, without being able, in the pressure of other business, to examine the question in the light of the facts presented in the report, with that care and deliberation which we would be glad to do, if it were practicable."

The judge was evidently not very confident in the correctness of his opinion.

I. There is no lien in this case. A right of prior payment does not constitute a *lien.*

See United States v. Fisher, 2 Cranch, 358-390.

United States v. Hoe, 3 C., p. 90.

In the last case, Chief Justice Marshall says: "In construing statutes on this subject, it has been stated by the Court, on great deliberation, that the priority to which the United States are entitled does not partake of the character of a lien on the property of public debtors."

The statute referred to was the act declaring that where a revenue officer or person indebted to the United States shall become insolvent, or where the estate is in the hands

of an administrator or executor of a deceased debtor, and there is not sufficient to pay all the debts, the debts due to the United States shall be first paid. And in the case of United States v. Hoe, 3 Cranch, the question arose as to whether the debt of the United States had priority over a trust deed made by Hoe to secure and indemnify one of the sureties on his bond. Hoe, the surety, did not know when the deed was made that the officer was insolvent.

In the case of City of Cincinnati v. Morgan, 3 Wallace, p. 376, the Legislature of Ohio passed an act authorizing the City Council of Cincinnati to issue its bonds for $1,000,000 to a certain railroad; one section of which is as follows:

"That it shall be the duty of the City Council, and it is hereby authorized to contract with the said company, to secure by mortgages, transfers or hypothecations of stocks of said company, or by such other *liens* or *securities*, real or personal, as may be mutually agreed on, the payment of the amount of the principal of such bonds, as may become due, and for the re-imbursement of the interest upon the same, which shall have been paid by the city; and for the further purpose of securing the city against all loss or losses, which the same may suffer, whether by the payment of the said principal or interest, or any damages arising therefrom, that the above described liens, mortgages or other securities, shall have priority or precedence of all claims or obligations subsequently contracted by such company, and over other liens, securities or mortgages which were not duly entered into between the company or other persons before the respective issues or loans aforesaid."

In this case it was held by the Court, that neither by the terms of the statute, nor by certain other statutes relied on

as helping out the lien, nor in any other way was a lien on the road given to the city, as against *subsequent mortgages.* The Court held in effect, that the statute created no lien, but left it to the parties to determine what kind of lien should be given.

That a right of prior payment does not constitute a lien; see also:

Anderson v. State of Mississippi, 23 Miss., 475.

Rogers v. Hosach's executors, 18 Wendell, 344.

Citing Bradley's case, reported in Ridgway's Chancery Cases, 194, in which Lord Hardwick says, "a promise to pay a debt out of a particular fund, does not create a specific lien."

In the case of Rogers v. Hosack's executors, 18 Wendell, it is held that a covenant by a debtor to pay certain debts owing by him out of a designated fund, when the same shall be received by him, cannot be construed into an equitable mortgage of the fund so as to give the creditors a specific lien thereon.

In the case at bar, the bonds were to be issued upon such conditions as may be agreed upon, and no conditions were agreed upon, except such as the act of the Legislature itself imposed.

By the act of February 10, 1864, the road not being completed, the General Assembly of Missouri authorized the company to borrow $1,500,000, payable in 4, 5 and six years, and to secure the amount by a first lien on the road west of Dresden, the State waiving, for this purpose and to this extent, its priority of lien, which it had upon the whole road by virtue of previous acts of the Legislature.

The State, at that time, having a lien for $7,000,000 upon that part of the road which was completed, and having re-

linquished its claim for lien on the road from Dresden west, by the provisions of the act of February 10, 1864, and with the consent of the company, took charge of the earnings of the road through a Fund Commissioner, a State officer appointed for that purpose, and waiving, for the present, its right to foreclose under its first mortgage, authorized the Fund Commissioner to negotiate the Dresden bonds, take charge of the proceeds of the bonds, apply the proceeds as directed by the act, to the completion of the road; he was to continue in office, with the powers vested in him by the act, until the bonds issued for the completion of the road, and the State bonds loaned to the company were fully paid with interest.

All gross earnings of the road from all sources were to be paid in daily to the Fund Commissioner, and all other sources of revenue belonging to or connected with the road were placed under his control and taken into his possession as they arose. The road, however, was to be run by the company, and all payments made for construction, equipment or operation, were to be made upon vouchers approved by the officers of the company—provision was made for the issue by the company of first mortgage bonds to take the place of State bonds loaned by the State to the company, the mortgage to secure them being a lien only to the extent of the State bonds which might be taken up, surrendered and canceled.

This was the condition of the company on the 7th of January, 1865, when the act in question, in reference to the loan from St. Louis County was passed.

The company had no control over its funds or of the earnings of the road, nor had it any property of any kind upon

which a lien could be given to secure the payment of this county loan, and this the County Court of St. Louis County well knew, for it made an effort to get security, and was told by their counsel, that "if the bonds were issued and loaned, the ultimate dependence for their payment lay in the responsibility of the company, present and future, in its ability to pay." But all parties concerned were anxious for the completion of the road, and doubtless believed, that if completed it would be able to pay all its debts, and the proceeds of the Dresden bonds not having proved sufficient to complete it, the County Court determined to make the loan, the State agreeing that the Fund Commissioner should pay the interest out of the earnings of the road, and the company agreeing, by accepting the provisions of the act, that the Fund Commissioner, or such other person as might thereafter have the custody of the funds of the railroad company, should pay the interest out of the earnings of the road, the payments to continue until the bonds were paid off by the company.

The State, at this time, controlled all the earnings of the road, and by the act of 1864, had required the Fund Commissioner to apply the net earnings of the road, after the payment of his salary:

1. To the extension and equipment of the road, reserving enough to pay the interest on the new bonds sold; and after the completion of the road, to the payment of the bonds themselves.

2. To the payment of the interest on the first mortgage bonds.

3. And next, not to exceed six per cent. dividend on the preferred stock.

4. And the surplus to the purchase of outstanding State bonds.

[This preferred stock was to be obtained by giving to the holders of the State bonds issued to the Pacific Railroad, who chose to surrender them, certificates of full paid stock to the amount of bonds so surrendered.] The company has assented to all this by accepting the act of 1864, and it has no power to divert the earnings of the road to any other purpose than those provided for in the act of 1864 without the consent of the State, because the State held the earnings and the Dresden bonds to secure the completion of the road, and to protect its own claim against the company for the $7,000,000 of debt; and it did agree that the interest of the St. Louis County bonds should be paid out of the earnings; and the company did agree that whoever might have the custody of the funds of the company should pay the interest out of the earnings, that is, that the interest should be paid, and the principal also; and that is all there is of it—an agreement to pay a loan. For when the company said the interest should be paid out of the earnings, it simply said the interest should be paid, there was nothing else to pay the interest with.

In other words, the State by passing the act, and the company by accepting it, simply said that the interest on the bonds should be paid out of the earnings of the road, the effect of which might be to leave nothing as a surplus for the purchase of outstanding State bonds, nothing for dividends on preferred stock.

The interest on this loan was paid by the Fund Commissioner to the County of St. Louis up to the time of the act of March 31st, 1868, which provided for the sale of the Pacific Railroad. There were two modes of sale provided by that act;

the first, contained in the 1st, 2d, 3d and 4th sections of that act, and which authorized a sale by the Governor of the State under the provisions of the act of 1851, which created the State lien, at a price not less than $8,350,000; and the second, contained in the provisions of the 5th section of the act, and which authorized a private sale to the company of the debt of the State, at the price of $5,000,000, provided that sum should be paid into the treasury within the time limited by the provisions of the section.

In case the State should become the purchaser of the road, under the provisions of the four first sections of the act, the State bound itself to assume the payment of the principal and interest due on the $700,000 issued by the county of St. Louis, and also the floating debt of the company existing at the time of the passage of the act of 1868, not to exceed the amount of $650,000.

The purchase of the road was made by the company, under the provisions of the 5th section of the act. By this purchase the company received a full discharge and release from all claims or debts, and all liability growing out of the issue of the bonds of the State to aid in the construction of its road. This purchase secured the property to the company released from all obligations to the State, and left the unsecured creditors to look to the company for payment instead of to the State. And the same act abolished the office of Fund Commissioner, and all the provisions of the act of February 10th, 1864, applying to him and prescribing his duties and powers. In all this legislation in reference to this matter, there is not a single expression which indicates that the State or the company intended to create a lien on the road or its

income, or any of its property, for the payment of the debt of $700,000, or the interest thereon.

Nor is there anything in the contract made by the company to pay the debt, or in the order of the County Court providing for the issue of the bonds, creating such a lien. The language of the contract, as recited in the order of the Court, is, that the road shall assume the prompt payment of the bonds at maturity, so that the same may become "a legal indebtedness on the part of the Pacific Railroad to the county of St. Louis," and this the railroad company agreed to.

The facts in this case show that neither of the contracting parties, the Pacific Railroad nor the county of St. Louis, considered that there was any lien.

On the 30th of November, 1866, the company issued a printed "financial statement," in which its contracted indebtedness was enumerated, the debt due St. Louis County being described as "$700,000, at 7 per cent. per annum, due the county of St. Louis for bonds maturing in 1855, for which there is no lien on the road." See p. 73 of the record. And by a resolution of the County Court of the date of March 25th, 1867, the presiding justice was authorized and ordered to "cast the vote of the county for directors of the Pacific Railroad for those gentlemen who are opposed to the sale of the road, unless the interest of the county of St. Louis is protected by the terms of sale." See page 73. The county of St. Louis was at this time a large stockholder, and on the 21st of October, 1875, the following proceedings were had by the County Court:

THURSDAY, Oct. 21, 1875.

Justice Finney offers the following which the court adopts:

WHEREAS, the affairs of the Missouri Pacific Railroad are

in an unsatisfactory financial condition; and, whereas, said railroad company is now indebted to the county of St. Louis in the sum of seven hundred thousand dollars ($700,000) loaned to said company without security in the year 1865, together with a considerable sum of unpaid interest thereon; and,

WHEREAS, there is good reason to believe that if immediate and strenuous efforts are not made, the County of St. Louis will lose a large sum of money, it is therefore

Ordered that a committee of three be appointed to confer with the county counselor, and to direct and cause to be instituted such proceedings and suits as shall be found necessary to protect the interests of the county in the premises." See p. 78 of printed transcript.

A committee was appointed, additional counsel employed, and a proceeding instituted in the name of the County of St. Louis in the United States District Court to put the company into bankruptcy. The petition was sworn to by the treasurer of the county and presiding justice of the County Court as agents of the county, and averred that its demand was provable under the acts of Congress, and amounted to at least one-third of the unsecured debts provable against the company.

See p. 78 of the record.

Now, it does seem to me that in all this history of the transaction there is nothing to show the intention of any of the parties; as interpreted by anything done at the time or afterwards to create "a lien or charge statutable in its origin, and equitable in its nature, on the earnings as they arose which might be enforced by the county so long as the bonds

remained unpaid," as stated in the opinion of the court below.

The authorities cited clearly show that the statute did not create the lien, and whatever the parties might have done under the authority of the statute there was nothing actually done or said to create a lien, but on the contrary all that was done or said on the subject shows that they did not consider that any lien existed.

But if there was a lien as between the parties there was no notice of it to subsequent mortgagees.

The act of the legislature was a private act, and private acts do not conclude third persons or strangers, and they are not bound to take notice of a private act, though there be no general saving clause of their rights. This is a rule of ancient date and has been steadily adhered to.

See Sedgwick on Construction of Statutes, p. 27, 2nd edition.

Jackson v. Cashier, 2 Johns. R., 247–263.

It is claimed that the lease of the property made to the Atlantic & Pacific Railroad Co. was recorded in various counties of the State, and that the recording of that lease imparted constructive notice to all the world of the existence of this lien. But there is nothing in the lease which says anything about a lien for the security of that debt. There is an obligation in that case made by the Atlantic and Pacific Railroad Company binding that company, as a part consideration for the lease, to pay $700,000, being the amount of certain bonds of the County of St. Louis which were by said county loaned to the Pacific Railroad, and which it undertook and agreed to pay, and which are due and payable on the first of February, 1885, with interest at the rate of

seven per cent. per annum. But there is nothing said about a lien to secure the payment of these bonds; on the contrary, the lease, after reciting the St. Louis County bonds, the $7,000,000 of gold bonds, the $3,000,000 of currency bonds, the interest of which the Atlantic and Pacific Railroad Co., by the terms of the lease, assumes to pay, recites that all of said bonds except the St. Louis County bonds, are secured by mortgages, which is in fact notice to all the world that the St. Louis County bonds were not secured.

We maintain, therefore:

1. That there was no statutory lien, because there is no language in the act itself, which shows that the Legislature intended to declare a lien, and that the act of 1868, under which the road was sold, and which places the St. Louis County debt upon the same footing with the floating debt of the company, shows that the General Assembly of Missouri did not consider that this debt was a secured debt.

2. That although it was contemplated by the act of 1865, that the funds of the company might pass out of the hands of the Fund Commissioner, and the County was authorized to make the loan under such conditions as might be agreed upon between it and the railroad company, yet no security was provided for in any agreement between the parties.

3. That if such a lien had been created, and was valid between the parties, the subsequent mortgagees had no notice of it, and are not bound by it.

JAS. O. BROADHEAD,

Solicitor for Appellants.

Supreme Court of the United States.

No. 162.

GEORGE E. KETCHUM, JAMES SELIGMAN, THE ATLANTIC AND PACIFIC RAILROAD ET AL., APPELLANTS,

vs.

THE COUNTY OF ST. LOUIS, INTERVENOR.

ARGUMENT OF JAMES O. BROADHEAD, SOLICITOR FOR APPELLANTS.

RUFUS H. DARBY, Printer, 432 Ninth street, Washington, D. C.

IN THE

Supreme Court of the United States.

GEO E. KETCHUM, JAMES SELIGMAN, THE ATLANTIC AND PACIFIC RAILROAD ET AL., Appellants,

vs.

THE COUNTY OF ST. LOUIS, Intervenor.

No. 162.

ARGUMENT OF JAMES O. BROADHEAD, SOLICITOR FOR APPELLANTS.

JANUARY 22, 1880.

If the court please, I shall say nothing in regard to the question of indebtedness on the part of the Pacific Railroad to the County of St. Louis and the City of St. Louis. That is not the question. That indebtedness accrued mainly in consequence of subscriptions for stock, and can only have any bearing in this case from the fact that it was an inducement on the part of the County of St. Louis to give further aid to secure the completion of the road, so that her stock in the company might become more valuable.

Mr. Bowman, in the very able and ingenious argument submitted to the court by him has presented, in my opinion, the true question and the only question in this case—a question arising as to the construction of the act of 1865. Of course, to arrive at a proper construction of that act, it is necessary to

refer to contemporaneous acts of the Legislature of Missouri, in order to ascertain the meaning of the language used in the act of 1865.

My first proposition in regard to the act of 1865 is, that the legislature intended only to bind the State to the county of St. Louis; that inasmuch as it had control of the funds of the Pacific Railroad derivable from all sources, that the State would consent that so long as it retained this control of the funds of the Pacific Railroad it would waive its priority of lien in regard to the payment of the interest on its own bonds, and that the County of St. Louis should be paid the interest upon the seven hundred thousand dollars of bonds, so long as it had control of the road; I mean, had control of the funds of the road.

Now, let us look at the language of that act.

It is found on the 65th page of the record. The first section of the act provides "That the County of St. Louis is hereby authorized to issue seven hundred county bonds of the denomination of one thousand dollars each, having twenty years to run, and bearing interest at the rate of seven per cent. per annum, payable semi-annually, the principal and interest payable in the city of New York, and loan said bonds to the Pacific Railroad Company for the completion of said road." So much in regard to the power vested in the county to issue said bonds. The law continues: "said bonds to be issued under such conditions as may be agreed upon between said county court and the board of directors of the Pacific Railroad Company, such conditions to be binding on the parties, but shall not impair or affect the validity of the bonds after they are issued."

Evidently the legislature contemplated that in regard to the issuing of these bonds, so far as the security for their payment was concerned, that the railroad and the county should make a contract. They were to be issued upon such conditions as "may be agreed upon between said county court and the board of directors of the Pacific Railroad Company." The county had the power to make a contract as to the security of these bonds

before they were issued, and the legislature contemplated that in that contract they should make such conditions as to the security as they thought best.

The second section says: "The fund commissioner of the Pacific Railroad, or such person as may at any time hereafter have the custody of the funds of said railroad company shall, every month after said bonds are issued, pay into the county treasury of St. Louis county, out of the earnings of said Pacific Railroad, four thousand dollars, and one thousand dollars additional in each month of December, to meet the interest on the said seven hundred bonds, said payments to continue until the said bonds are *paid off by the Pacific Railroad*."

At that time the fund commissioner had control of the funds of the company, hence the section provides that he shall pay into the county treasury of St. Louis county, out of the earnings of said Pacific Railroad, four thousand dollars, and one thousand dollars additional in each month of December to meet the interest on the said seven hundred bonds; said payments to continue until the said bonds are paid off by the Pacific Railroad. It was an agreement on the part of the State with the County of St. Louis to the effect that if they should issue these bonds the State would authorize the commissioner to pay forty-nine thousand dollars a year until the Pacific Railroad should pay off those bonds. Now, the Pacific Railroad was a party entirely ignored in this transaction, except that its assent was necessary to this diversion of the funds from the payment of interest on the State lien to the payment of interest on these bonds, but the language of the act, so far as it affected the company, applied only to the contract it might make with the county for the payment of the bonds, principal and interest. It was contemplated that the railroad might pay off these bonds, and until that time, and so long as the State should have control of the funds, whether in the hands of the commissioner or such other officer as might be appointed in his place, this interest should be paid by him.

Now, before I call the attention of the court to the contemporaneous acts of the legislature, I want to show the mis-

take of the gentleman in relation to the act of 1864, in maintaining that the right of the State to foreclose its mortgage was indefinitely postponed by the act of 1864. On the contrary, the act of 1864 expressly provides that the mortgage shall continue and be enforceable. I will read the section on page 50 of the session's acts of Missouri Legislature, A. D. 1863 '64.

By the COURT:

Is the act of 1864 printed in any of these records?

MR. BROADHEAD. Not the whole of it; the 2d, 3d, 4th, 7th and 10th sections I think are printed, but not the others. The 6th section is to the following effect:

SEC. 6. It shall be lawful for the Pacific Railroad Company to issue first mortgage bonds, having not more than twenty-five years to run from the date of their issue, and bearing interest at six per centum per annum, payable semi-annually, to the amount of the State bonds loaned to said main road, together with all the interest due and unpaid; said mortgage bonds shall have the effect of a first mortgage upon the said road only to the extent of their exchange for bonds of the State, when the same are delivered up and cancelled with unpaid coupons attached; these first mortgage bonds shall be countersigned by the auditor of the State and delivered to the said Pacific Railroad Company, upon a return to him of an equal amount of State bonds, including interest due and unpaid, with unpaid coupons attached, and the first mortgage bonds thus issued shall share in the security now held by the State in said main line of the Pacific Railroad, in proportion that their amount may bear to the bonds and coupons remaining unpaid, and which have been issued by the State for the benefit of said main line so that in case of the *sale* of said main railroad, by *default* or *otherwise*, the proceeds of said sale shall be divided in proportion as aforesaid between the State and the holders of the said mortgage bonds.

By the COURT:

That was a case contemplating an exchange of the bonds of the Company.

MR. BROADHEAD. Yes, sir, but the act provided for a case of a default in the payment and a sale under the first mort-

gage; so that the Pacific Railroad was put in a position by this act to retrieve its fortunes, provided any one would take the first mortgage bonds in substitution for State bonds and only to the extent to which they were substituted. For instance, a person might agree to take the first mortgage bonds of the company in exchange for any State bonds he might hold. The State bonds would be surrendered and cancelled, and the bonds he held from the company would be a first mortgage *pro tanto*, and he would share with the State in its security.

Your honor is mistaken in supposing that by the act of 1851, the State took possession of the road by virtue of any provision in the mortgage. The act expressly provides that it shall be accepted by the road, and it is stated, I believe, in the report of the Master that it was accepted. But it was because of the condition of the company at that time, it being unable to complete its road. The State agreed by this act with the company, that it would release its lien upon the road west of Dresden, and the company should issue bonds, secured on the road west of Dresden, to the amount of fifteen hundred thousand dollars. These bonds were to run four, five and six years. Then a commissioner was to be appointed who should take charge of the funds of the railroad, and they should be paid out on the vouchers of the officers as provided by this act. It was the duty of the State to see that its interests were protected, inasmuch as it had permitted the company to issue first mortgage bonds, secured on the road west of Dresden, for its completion.

The question is then, not whether the county had a lien as against the State, by virtue of the contract, that the interest on the debt should be paid out of the net income of the road, but whether that agreement made between the State and the County of St. Louis when those bonds were issued extended to the company; whether there was any contract on the part of the company by which a lien was created to take effect after the State had ceased to have control of the road, and ceased to have control of the funds; by which the company bound itself, in the nature of a statutory lien, growing

out of the provisions of this act, that the county should be paid, not only at the time the State had possession of this road, but after it passed out of its possession, until the principal was paid; that is, in the language of the decree of the circuit court in this case, "whether any person to whom the property shall pass, by sale, shall be subjected to the payment of the interest, and that a lien should exist against it in their lands."

It is unnecessary to go into the question how far a mortgagor can control the income of mortgaged property. I suppose I can say that this control exists so long as the mortgage remains in force, and only while the mortgaged property is in the possession of the mortgagor. The property is the mother of the income, but when the mother passes into the hands of some one else, the income, of course, as a general proposition, passes with it, and by the provisions of this act there is nothing which will contravene that doctrine.

By the COURT:

The words are, that the person who shall pay from month to month, is a person in the custody of the funds of said railroad company—that is, the Pacific Railroad—and not of any other company.

Mr. BROADHEAD. I should say that the Legislature could only have meant what it said, that the funds of the Pacific Railroad, and not the earnings of any other company, should be applied to the payment of this interest. When the earnings were in the hands of the agent of the company, they were in the hands of the company; but when the funds were in the hands of an officer of the State, or a person appointed by the State to hold them for the benefit of all parties concerned, there was a fund holder who might possibly be compelled by the County of St. Louis to pay, because that would be an equitable assignment of the fund; but in the hands of the company itself or its agent, (because a corporation can only act through agents,) there would be no such assignment, the company would have control of the fund.

By the COURT:

Suppose the act had said "treasurer of the company," instead of "fund commissioner?"

Mr. BROADHEAD. It would still be in the control of the company, and not of a third person. The doctrine of the law in this respect is clearly expressed by this court in the case of Christmas *vs.* Russell, 14 Wallace, in the opinion delivered by Justice Swayne in that case, and it is sustained by all the authorities. This opinion states that the law is very clear that "an agreement to pay out of a particular fund is not an equitable assignment; a covenant in the most solemn form has no greater effect." We will suppose this was an agreement, virtually amounting to an agreement made by the company, that if it should come into the possession of the property and the income which had been in the hands of a receiver, and that it, or its agent, should pay to the County of St. Louis the sum of forty-nine thousand dollars per annum, as interest on this debt. I say there is no lien created there, because it is not a contract that can be enforced against any specific property Now, I will not admit that it could be enforced against the State, but it might be by mandamus against the fund commissioner because he was a public officer. Suppose the company had agreed that it would be paid as soon as the road came into the possession of the company—that it would pay this forty-nine thousand dollars, a year's interest on the debt; this would constitute no lien, because the funds out of which the payment is to be made are in the control of the company, and this court in the case I have cited, says: "The assignor must not come into control of any of the funds, and no authority must remain to collect them, nor must there be any power of revocation." If any such authority or any such power remains, it is fatal to the claim of the assignee. The transfer must be of such a character that everything conveyed by the assignment is completely transferred.

Now it may be that the holder, the fund commissioner, might be compelled as a public officer to pay, because the County of St. Louis would have in the hands of a third person

the property as security for the debt. But when the Pacific railroad agrees that it will pay this money out of its earnings there is no lien created, because the company still has control of the property. The fund is not in the control of the assignee, but of the party who makes the assignment. It is simply an obligation to pay that money. There is no lien created. But will the gentlemen seek to apply it to any other than the fund commissioner? Judge Phillips, in his argument, brings us down to the fund commissioner, and there he stops. Mr. Bowman attempts to extend it to the county, but he has not discussed the question at all, as to the right to enforce this lien, and if it is not enforceable in any form, how does it become a statutory or equitable lien? Under the doctrine laid down by the court, and which is supported by all the authorities, it clearly is not. This is a question between the parties interested in the property of the Pacific railroad and the County of St. Louis. Is there a lien created by the provisions of this act which will extend to the income of the road, no matter into whose hands it may pass? That is the question.

When Mr. Leighton gave his opinion, he did not contemplate a period when this fund would pass out of the possession of the State, and his opinion refers only to the condition of affairs existing at the time he gave it. He was the attorney of the Pacific railroad, and I think, perhaps, he gave a correct opinion. I am not here to dispute it. He says: "The second (section) is, in effect, a partial release of its interest, for the State can have no legal control over this fund, except as a *cestui que trust*, under the relations heretofore established, and then only over its interest. In this respect it occupies no higher relation than an individual would holding the same claims. By directing therefore, with the assent of the company a different appropriation of the funds to which it was before the passage of the act entitled, it postpones or waives its own claim to that extent in favor of the party authorized by this act to receive them, viz: the County of St. Louis. The claim of the county upon the earnings of the road under this act could be easily enforced. The fund commissioner is a public officer,

and where his duty is well defined, and, as under the second section of this act, purely ministerial, he may, in case of failure to pay over the amount monthly, as directed by the act, be proceeded against by *mandamus*, and compelled to perform the duty enjoined upon him by law."

Can this ha ve reference to anything else, except as to how the County of St. Louis can enforce its claim against the State?

By the COURT:

May or may not the owner of a railroad mortgage its future earnings so that it would hold good, although he subsequently sold the road?

Mr. BROADHEAD. Probably with notice to a purchaser it would be binding. I think the general doctrine is, the earnings must accompany the property.

By the COURT:

The gist of the argument is, that that mortgage became inoperative when the road was sold and went into the hands of another party.

Mr. BROADHEAD. I say it would be inoperative because not operative against the company at all. I say there is no lien against the company, and if any lien at all, is created by the act, it is a lien against the income while in the hands of the State.

By the COURT:

Might not the act have been so drawn as to cover the future earnings, although the road had passed into other hands? Whether it did or not is a different question.

Mr. BROADHEAD. I suppose it might, by language broad enough for that purpose, and by making the earnings a charge upon specific property.

By the COURT:

Therefore it is a question of the construction of the statute.

Mr. BROADHEAD. Yes, sir.

Mr. Leighton was the attorney of the railroad and Mr. Clover was the attorney for the county. I do not think that

there is any conflict in their views in regard to this matter. Mr. Clover says, on page 67:

"You therein desire my opinion upon several propositions as to the legal effects of the second section of the act, and if the payments therein fixed are secured to the county beyond all contingencies until such times when the bonds themselves may be paid by the Pacific Railroad Company."

On page 70 he says:

"You ask, in conclusion, what steps will be necessary to make the act, if accepted by the court, binding upon the Pacific Railroad. To which I can hardly make reply. The act, if acceptable to the county court, is binding upon the Pacific Railroad; but how binding the obligation may be is a different question. I suppose if the bonds are issued and loaned, the ultimate dependence for their payment, principal and interest, lies in the responsibility of the company, present and future, in its ability to pay. If it is able it can be compelled to; otherwise, of course not."

Now it was on this opinion of the councillor of the County of St. Louis that the order was made for the payment of these bonds. On the same page the order of the court is given. It is as follows: "The provisions of an act of the General Assembly of the State, entitled 'An act authorizing the County of St. Louis to issue bonds,' approved January 7, 1865, is hereby by the County of St. Louis accepted, and upon the passage of a resolution of the board of directors of the Pacific Railroad, binding them likewise to the provisions of said act, an issue of bonds of the county to the number of seven hundred, each of the denomination of one thousand dollars, having twenty years to run, and bearing interest at the rate of seven per cent. per annum, payable in the city of New York semi-annually, is hereby ordered, which are to be delivered to and loaned by the county to the Pacific Railroad for the completion of said road. And the Pacific Railroad is likewise required, by the action of its board and authorities, to assume the prompt payment of said bonds at their maturity, so that the same may

constitute a legal indebtedness on the part of said Pacific Railroad to the County of St. Louis for the bonds hereby ordered to be issued and loaned. The said bonds are to be sold upon such terms as this court or its presiding officer may agree upon."

The object was to put the debt in such form that they could use it. So that by the contemporaneous act of the County of St. Louis, it is very clear that they were of the opinion that there was no lien, so far as the county was concerned. The legislature provided that the bonds should be sold on such terms as should be agreed upon. On the next page it appears that this was accepted. These two orders state the contract and its acceptance. That is, it was to be paid—a *bona fide* debt—and put in such a form that the county would have the evidence of its indebtedness.

Now, the gentleman says that the act of 1868 recognizes the existence of this lien. That is an important proposition as connected with the intention of the legislature in the passage of the act of 1865; and contemporaneous acts on the same subject must be interpreted together, and if anything can be drawn from this act of 1868, in which it was provided that this road should be sold, it cuts an important figure in the construction of the act of 1865. But I hold it to be true that the legislature was of the opinion that no lien was created so far as the Pacific Railroad was concerned, and that this is shown by the act of 1868. Now, the act of 1868 is referred to at page 73 of the transcript. On the 31st of March the legislature passed an act providing "for the sale of the Pacific Railroad, and to foreclose the State's lien thereon, and to amend the charter thereof." The first, second and third sections provide that the road shall be sold under the provisions of the statutory mortgage created in favor of the State, provided that if the road shall be sold and the State be the purchaser it shall purchase it at not less than eight millions three hundred and fifty thousand dollars.

And the act provides, also, in section 6, that "in case of a

sale of said road under the provisions of sections 1, 2, 3 and 4 of this act, the State of Missouri shall assume the payment of the principal and interest due on seven hundred thousand dollars in bonds issued by the County of St. Louis as a loan to the Pacific Railroad Company, under the act of January 7, 1865; and also the floating debt of said company existing at the time of the passage of this act, not to exceed the amount of six hundred and fifty thousand dollars."

So the tenth section provides that in case the State shall be the purchaser that "all bids and proposals for the purchase of said road shall assume, first, the payment of principal and interest due on the one million five hundred thousand dollars first mortgage bonds, issued under the act of February 10, 1864; second, the principal and interest due on the seven hundred thousand dollars bonds, issued by the County of St. Louis to the Pacific Railroad Company, under the act of January 7, 1865; third, the floating debt of said Pacific Railroad Company, existing at the time of the passage of this act, not to exceed the amount of six hundred and fifty thousand dollars."

Now in one sense, all these debts were unsecured debts, and when I say unsecured debts, I mean the Dresden bonds also. I do not mean that the Dresden bonds were not secured by a mortgage on the road west of Dresden, but in addition to that, the act of 1864, which authorized their issue and authorized the fund commissioner to pay out of any earnings the interest on the bonds, provided, also, that the net earnings, after the completion of the road, should be applied to the payment of the bonds themselves, which afforded additional security to the holders of the same.

The first section of that act provided that "all the net profits of the road shall be applied to the extension and equipment thereof until completed as aforesaid, reserving, however, sufficient for the payment of the interest accruing semi-annually on said bonds actually sold; and after the completion of the road any surplus over the accruing interest, shall be applied to the purchase or payment of the bonds themselves."

In 1868 the road was completed, so that by virtue of the act of 1864, the net earnings were applicable to the payment of the Dresden bonds. They were not paid, however, because the five years had not elasped during which they were to run. The act authorized the issue of bonds to mature in four, five, and six years. The duties of the fund commissioner show that he was to apply the net earnings first to the payment of the interest on the bonds actually sold and, after the completion of the road, to apply the net earnings of the whole road to the payment of the bonds. But that was no lien. The only lien which the holders of the Dresden bonds had was upon the road itself west of Dresden. This, then, is true in regard to the floating debt, in regard to the debt due the County of St. Louis, in regard to the application of the earnings towards the payment of the Dresden bonds. Suppose the road was sold to a third party, of course the purchaser does not bind himself for the payment of the debts of the party whose property is sold.

If the company should comply with the provisions of the fifth section, it gets the road, but there is no provision, that if the company gets the road, it shall pay the debt due to the County of St. Louis, nor the floating debts, nor the interest on the Dresden bonds and other debts due by the Pacific Railroad. It is an honest debt, due by the Pacific Railroad Company, and the Dresden bonds are a debt due by the Pacific Railroad Company, and the company is bound to pay its own debts, but if the property is bought by a third party, the third party is not bound to pay; the State made a condition thereof in regard to the purchaser that any outside party who shall purchase it shall bind itself to pay the St. Louis County and the other debts named.

But it did not apply in case the company were the purchaser. The Governor was authorized to take possession of the road and sell it under the first, second, third, and fourth sections of the act, and if the State became the purchaser, it was to assume the payment of the debt; if any one else became the pur-

chaser, by the tenth section the payment of these debts was to be assumed; but by the fifth section, if the company became the purchasers, there was no condition that it should pay the debt of the County of St. Louis. Now the argument is, that by the reference made to that debt that the State intended to preserve a lien. I think the contrary, that it did not, because if a lien existed, there was no necessity that these debts should be secured by the purchaser, and they are secured by providing that it any one else should purchase it, they shall assume the payment of these debts.

In the passage of the act of 1868, if the legislature had been of the opinion that the debt of the County of St. Louis had been secured by the mortgage, there was no necessity of making provision that the purchaser should pay, because it was a mortgage security enforceable by the act of 1865 against whoever might be the purchaser, whether a lien on the earnings or on the road, but the very fact that they made that provision in regard to the State or any other person and did not make it in regard to the company, shows that they did not regard it as a lien. Why did they not make that provision in regard to the company? Because it was a debt of the company. It was an obligation of its own. What the security is, is another question. But if another party had become the purchaser, he would not be bound, in the absence of any provision in the act of 1868, to pay those debts. As shown by the evidence in this case the parties themselves did not consider that any lien existed. In the financial statement made the next year this was entered as an unsecured debt, and by the county court it was spoken of as an unsecured debt, and in the bankruptcy proceedings it was spoken of as an unsecured debt which would give them the right to proceed against the company to force them into involuntary bankruptcy, all of which shows that the parties themselves did not look on it as a debt secured by lien.

The decree is, "That the said equitable charge is hereby decreed to exist and be enforceable on said earnings of said railroad property and franchises against the funds in the hands of

the receivers herein, and the purchasers under the mortgage sale heretofore ordered." So that in the opinion of the court, if this was a lien at all it attached to the property. But there is nothing whatever to show that it attached to the property. The amount was simply payable out of the earnings of the Pacific Railroad—not of any other company—nor was it payable out of the earnings of the main line or any of its branches, nor made a charge upon any specific property owned by it. Mr. Day, in his brief, has cited numerous authorities to show, that if a lien can be created in this way, the debt must be made a charge upon the earnings of specific property, and not upon the general earnings of a person or a company.

And it must be enforceable by the assignee; either by putting the assignee in control of the fund or by placing it in the hand of a fund-holder, and beyond the control of the assignor; and nothing of that kind exists in the case before the court. In this case, the Pacific Railroad has the complete control of the fund and the property out of which it arises, after the time when the State ceases to have control of the fund, so that the Pacific Railroad has complete power to mortgage the property; and if by this means it passes under control of another company, that company is not bound to pay the debt.

I do not know that I am disposed to trouble the Court with any further argument on this question. I think the question is upon the construction of the act of 1865 in connection with the contemporaneous statutes. But I see no reason to suppose that it was intended to apply other than to the fund commissioner while he had charge of the funds of the road, and not to the road after it was released. And when the act says "any other person who shall have charge of the funds," it means any other person who may be appointed by the State in the place of the fund commissioner.

Supreme Co

OF THE UNITED STA

THE COUNTY OF ST. JOHN

STATEMENT

on behalf of

Supreme Court of the United States.

GEORGE E. KETCHUM *et al.*, *Appellants*,
vs.
ST. LOUIS COUNTY, INTERVENOR, *Respondent.*
} OCTOBER TERM, 1879.

APPELLANTS' STATEMENT OF FACTS.

On November 11th, 1875, George E. Ketchum, a holder of some of the third mortgage bonds of the Pacific Railroad, a corporation of Missouri, instituted a suit in the United States Circuit Court for the Eastern District of Missouri, asking for the appointment of receivers to take charge of the property of the company and for a foreclosure sale of the property covered by the third mortgage. The third mortgage covered the entire railroad of the company extending from St. Louis to Kansas City, including its rolling stock, appurtenances and franchises, as well as its Carondelet branch. This mortgage was made, and the foreclosure sale was sought to be had, subject to four other mortgages described in the bill of complaint which had previously been made by the company, viz.:

1st. A "first mortgage," dated July 15th, 1868, made to secure bonds to the amount of $7,000,000, and covering the entire line of road. (Printed Record, page 2.)

2d. A "second mortgage," also covering the entire line of road, dated July 1st, 1871, and securing bonds to the amount of $3,000,000, of which $2,800,000 were outstanding at the date of the filing of the bill (p. 3).

3d. A "real estate mortgage" on certain real estate in the city of St. Louis, dated April 19th, 1872, securing bonds to the amount of $800,000 (p. 3).

4th. A "Carondelet branch mortgage" on a branch 13 miles long, extending from the main line to Carondelet, dated October 1st, 1873, securing bonds to the amount of $500,000.

The mortgage under which the foreclosure proceedings were sought to be had was dated July 10th, 1875, was made subject to all the four mortgages above named and was given to secure bonds to the amount of $4,000,000 (p. 5).

The trustees in all the mortgages referred to, as well as the Pacific Railroad, were made defendants in the foreclosure proceedings.

On May 3d, 1876, the Court appointed receivers to take charge of all the company's property (p. 17).

On June 6th, 1876, a decree of foreclosure was rendered in the case, in which a sale was ordered to be had by the Master (p. 24). Such sale was had (p. 33) on September 6th, 1876, at which James Baker became the purchaser.

This sale was confirmed by the Court on October 6th (pp. 29, 30), and a deed was made under the order of the Court, and the Missouri Pacific Railway Company, as assignee of James Baker, the purchaser, thereupon took possession of all the property which had been covered by the third mortgage.

The county of St. Louis was not made a party to the original proceeding, but on the 20th of April, 1876, being prior to the decree of foreclosure, it filed an intervening petition in the case (p. 36). This was not passed upon by the Court at the time of the decree, but the decree contained a provision as follows (pp. 28 and 29):

"It is further ordered, adjudged and decreed that nothing in this decree shall be construed to prejudice in any manner the claim of the county of St. Louis to a lien on the property and franchises of the said Pacific Railroad alleged by the said county to exist, as fully appears by the amended petition in this cause, filed by the said county, for securing the payment of a certain debt of the said Pacific Railroad to said county for the sum of $700,000 and interest thereon, and alleged and claimed by the said county of St. Louis to be a prior lien therefor over all other incumbrances upon said property and franchises, the question

of the existence and priority of said lien to be hereafter determined by this Court, if not otherwise satisfactorily adjudged."

The Intervening petition, claiming a lien in favor of St. Louis County, is as follows (p. 37):

To the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Missouri, in the Eighth Circuit, sitting in Equity:

First. The county of St. Louis, a municipal corporation of the State of Missouri, by leave of the Court in this cause, comes and files this its intervening petition herein, and respectfully represents to this Honorable Court and shows that said county of St. Louis is a corporation duly organized under the laws of the State of Missouri, being a political subdivision of said State, with full powers under the laws thereof to sue and be sued, plead or be impleaded.

Second. That the Pacific Railroad is a corporation, duly organized under the laws of the State of Missouri, and was, at the several times hereinafter mentioned, and now is, the owner of the Pacific Railroad (of Missouri), extending from St. Louis, in said State, westwardly to Kansas City, on the western boundary line of said State.

Third. That on the 7th January, 1865, the Legislature of the State of Missouri passed an act entitled, "An Act authorizing the county of St. Louis to issue bonds," in words and figures as follows:

"*Be it enacted by the General Assembly of the State of Missouri, as follows:*

"SECTION 1. The County Court of St. Louis County is hereby authorized to issue 700 county bonds of the denomination of one thousand dollars each, having twenty years to run, and bearing interest at the rate of seven per cent. per annum, payable semi-annually, the principal and interest payable in the city of New York; and loan said bonds to the Pacific Railroad Company for the completion of said road; said bonds to be issued under such conditions as may be agreed upon between

said County Court and the Board of Directors of the Pacific Railroad Company, such conditions to be binding on the parties, but shall not impair or affect the validity of bonds after they are issued.

"SECTION 2. The Fund Commissioner of the Pacific Railroad, or such person as may at any time thereafter have the custody of the funds of said Railroad Company, shall, every month after said bonds are issued, pay into the county treasury of St. Louis County, out of the earnings of said Pacific Railroad, $4,000, and $1,000 additional in each month of December, to meet the interest on the said 700 bonds; said payments to continue until said bonds are paid off by the Pacific Railroad. This act to take effect and be in force from and after its passage."

Fourth. That thereafterward, on the 18th January, 1865, the following order was adopted by the County Court of St. Louis County, namely: "The provisions of an act of the General Assembly of the State entitled 'An Act authorizing the county of St. Louis to issue bonds,' approved January 7, 1865, is hereby by the county of St. Louis accepted; and upon a passage of a resolution of the Board of Directors of the Pacific Railroad binding them likewise to the provisions of said act, an issue of the bonds of the county to the amount of 700 each, of the denomination of $1,000, having twenty years to run and bearing interest at the rate of seven per cent. per annum, payable in the city of New York semi-annually, is hereby ordered, which are to be delivered to and by the county to the Pacific Railroad for the completion of said road; and the Pacific Railroad is likewise required, by the action of its Board and its authorities, to assume the prompt payment of said bonds at their maturity, so that the same may constitute a legal indebtedness on the part of said Pacific Railroad to the county of St. Louis for the bonds hereby ordered to be issued and loaned. The said bonds are to be sold upon such terms as this Court or its presiding officer may agree upon."

Fifth. And thereafterward, at a meeting of the Board of Directors of the Pacific Railroad, held on January 19th, 1865, the following resolution was adopted:

"*Resolved*, That the Board of Directors of the Pacific Railroad unanimously accept of the terms, provisions and obligations set forth and contained in an act of General Assembly of the State of Missouri, entitled 'An Act authorizing the county of St. Louis to issue bonds,' approved January 7, 1865, to be observed and faithfully performed by this company, and that the President be and is hereby instructed to execute an agreement under the seal of the company, obligating the said company to promptly pay at maturity the said bonds authorized to be issued by said act.

"*Resolved, further*, That this company accept of the terms and provisions of an order of said County Court now here present and certified by the clerk of said court under its seal, and hereby obligates the company to an observance and faithful performance of all the provisions contained therein."

And your orator avers and says, that the order of said County Court referred to in the above-mentioned resolution of January 19, 1865, was a certified copy of the order of said County Court made January 18, 1865; that the same had been, by the clerk of said court, certified and delivered on said last-mentioned day to the Board of Directors of said Pacific Railroad in like form and manner as above set forth.

Sixth. And your orator shows that thereafterward, on the 20th January, 1865, a copy of the resolution of the Board of Directors of the Pacific Railroad, adopted 19th January, 1865, as above set forth, was filed in said St. Louis County Court.

Seventh. And that thereafterward, on February 3d, 1865, the said Court made the following order of and concerning the premises, namely: "That nothing further is needed to bind the Pacific Railroad in the matter of the loan of seven hundred of the bonds of the county to said company for the completion of said road, the resolution of the company of the 19th inst., obligates it to an observance and faithful performance of the order of the Court of the 18th inst., for the prompt payment of said bonds at their maturity."

And thereafterwards, there was executed and delivered by the county of St. Louis its bonds of like description, as above set forth, 700 bonds of $1,000 each, which said bonds were received

by said Pacific Railroad in amounts and dates, as follows: 100 bonds February 20, 1865; 200 bonds March 7, 1865; 400 bonds May 6, 1865; which said bonds were afterwards sold by said Pacific Railroad, and the proceeds realized therefrom used in the completion of said road.

Eighth. Your orator further shows and says, that on the 10th day of January, A. D. 1865, the President of the Pacific Railroad, for and on behalf of the company, presented to the County Court of St. Louis County the written opinion of the law officer of the corporation, Geo. E. Leighton, Esq., an attorney-at-law, in words and figures as follows:

"ST. LOUIS, Jan. 10, 1865.

"COL. GEO. R. TAYLOR, *President Pacific Railroad:*

"DEAR SIR:—In reply to your communication of yesterday, touching the construction and effect of the 2d section of the Act approved Jan. ——, 1865, I have to say:

"The Fund Commissioner is a public officer, created by the Act of Feb. 10, 1864. His position and duties, as defined by that act, are, in general terms, those of a general *trustee* or *receiver*, holding, with the assent of the company (as expressed by the acceptance of the act), the earnings of the company upon certain *express trusts*, among which are paying expenses of operating, etc., the road, paying interest and principal of loan under that act, and paying interest upon and purchasing State bonds. It is in the last of these only that the State, as *cestui que trust* under the relations so established, has an interest which could be affected by legislation.

"The 1st section of the present act authorizes the County Court to loan, etc., under such conditions as may be agreed upon.

"Although not mentioned in express terms, the act presupposes or rather anticipates an agreement to the effect, that the money for the payment of interest upon these bonds shall be furnished the county out of the earnings of the company.

"But as such an agreement could not be carried into effect—for, under the act of February 10, 1864, such earnings are not within the control of the company, but are in the hands of the

Fund Commissioner (as trustee) for the benefit of the State as a *cestui que trust*—the 2d section is enacted for the purpose of giving effect to such agreement, and makes it the duty of the Fund Commissioner to pay out of the earnings of the road certain sums monthly.

"If the act should be accepted by the company, and the County Court should make the loan authorized, the act would be binding upon all the parties, in favor of the County Court, to-wit: the Company, the Fund Commissioner and the State; neither could object to its execution.

"An agreement executed by the company, expressing its assent to such appropriation of the earnings of the road, would then, in my opinion, create in favor of the county an equitable *lien* or *charge* upon the earnings *pro tanto*.

"The direct authorization of such an appropriation of the earnings, or rather the direction to the Fund Commissioner (the trustee) to pay the monthly appropriation out of funds to the benefit of which it (the State) is entitled, is unquestionably, in my opinion, a waiver or postponement of the interest of the State as *cestui que trust* in favor of the county, to the extent and for the purposes specified in the act.

"The act admits of no other construction. The first section of the act, which authorizes the loan, is enacted by the State purely in its legislative capacity. The second is, in effect, a partial release of its interest, for the State can have no legal control over this fund except as a *cestui que trust*, under the relations heretofore established, and then only over its interest. In this respect it occupies no higher relation than an individual would, holding the same claims.

"By directing therefor, with the assent of the company, a different appropriation of the funds to which it was before the passage of the act entitled, it postpones or waives its own claim to that extent in favor of the party authorized by this act to receive, viz.: the County of St. Louis.

"The claim of the county upon the earnings of the road under this act could be easily enforced. The Fund Commissioner is a public officer, and where his duty is well defined and as under the second section of this act purely ministerial, he

may in case of a failure to pay over the amount monthly as directed by the act, be proceeded against by mandamus, and compelled to perform the duty enjoined upon him by law.

"Very respectfully,

"Your obedient Servant,

"GEO. E. LEIGHTON."

That the said opinion, to the effect that the act of 1865 and its acceptance by the company would constitute and create a lien, was presented by the company for the purpose of inducing the County of St. Louis to loan to said company the said sum of seven hundred thousand dollars, and relying upon said representation, and agreeing to the construction of the act of Jan. 7th, A. D. 1865, as to the creation of a lien in favor of the county, the said loan of seven hundred thousand dollars was made to said company.

Ninth: Your orator, intervening as aforesaid, further shows unto this Honorable Court that the Fund Commissioner of the Pacific Railroad was created by public laws of the State of Missouri, known as the act of February 10th, 1864, sections 5 and 6, and the act of 19th of November, 1857, sections 4, 5 and 7 of said act; and said Fund Commissioner was and is a State officer commanded and required to hold the custody of the moneys of the Pacific Railroad, and it was made the duty of said Fund Commissioner, as such State officer, to pay out of the earnings of the said railroad company the monthly interest stated, until the said seven hundred bonds were paid off by said Pacific Railroad.

Tenth: Your orator further says, that at the time the said act of the General Assembly of the State of Missouri, approved January 7th, 1865, was passed and took effect, the State of Missouri had a claim against said Pacific Railroad for bonds loaned said company by the State for about $8,000,000, on which the State claimed a statutory lien as a first mortgage; and on the 31st of March, 1868, a public act of the State of Missouri was passed and approved to sell and compromise the claims of the State of Missouri against said Pacific Railroad for the sum of $5,000,000, to be paid to the State by said Pacific Railroad.

And by said act of 1868 it was further declared, in section 6, that in case of a sale of said road under the provisions of sections 1, 2, 3 and 4 of the said act of 1868, the State of Missouri should assume the payment of the principal and interest due on $700,000, in bonds issued by the County of St. Louis, as a loan to the Pacific Railroad under said act of January 7th, 1865.

And by section 10 of said act of 1868 it was further declared, as follows: "All bids and proposals for the purchase of said road shall assume, *first*, the payment of principal and interest, and to become due on the $1,500,000 first-mortgage bonds issued under the act of February 10, 1864; *second*, the principal and interest due on the $700,000 bonds issued by the County of St. Louis to the Pacific Railroad Company, under the act of January 7, 1865," and other matters.

And the said Pacific Railroad, in accordance with the provisions of said act of 1868, compromised the debt of $8,000,000, and interest thereon for $2,050,000, by paying the State $5,000,000, the Pacific Railroad assuming to pay the said statutory lien in favor of St. Louis County for $700,000 principal, and $49,000 a year interest, as it existed under said act of 1865, all of which appears from the face of said acts of 31st March, 1868, and January 7th, 1865, which are public acts of the said State of Missouri, of which the mortgagees holding mortgages subsequent in date to the 31st day of March, 1868, have constructive notice, and are notified in law of the lien of the County of St. Louis therefor of that date.

Eleventh: And your orator further says that afterward, on the 29th day of June, 1872, a lease was made by and between "The Pacific Railroad" aforesaid and the Atlantic and Pacific Railroad Company of the Pacific Railroad, its rolling stock, tracks, depots, fixtures and appurtenances of every kind, and all its leased lines, for a period of 999 years, at certain rents and on certain conditions therein named, which lease was duly sealed, executed and deliverd by the Pacific Railroad, signed by the president and secretary of each of said railroad companies, on the day of its date. And in the said lease it was recited that the said Atlantic and Pacific Railroad Company should pay as and for annual rent on said lease the interest accruing and to become due and payable from and after the date of said lease

upon $7,000,000 six per cent. gold bonds issued by said party of the first part, dated August 1st, 1868; upon $3,000,000 of 7 per cent. currency bonds also issued by said party of the first part, dated July 1, 1871; *upon* $700,000, *being the amount of certain bonds of the County of St. Louis*, which were by said county loaned to the said party of the first part, and which it undertook and agreed to pay, and which are due and payable on the 1st February, 1885, with interest at the rate of seven per cent. per annum, all of which will more fully and at large appear by reference to said lease.

Twelfth: And said lease was duly executed by the respective parties, sealed, acknowledged, and recorded in the Recorder's office of each county in the State of Missouri through which said Pacific Railroad runs, and every mortgagee, including the complainants, had full and constructive notice of the statutory lien under the acts of January 7, 1865, and of March 31st, 1868, and they had further notice of the equitable lien of said County of St. Louis for the said $700,000 and interest thereon, and that such equitable lien had priority over all liens created after the 31st day of March, 1868, and priority over the lien of complainants.

And your orator further shows to this Honorable Court, that the said lien of the County of St. Louis is, and has always been recognized to be, a statutory lien, valid and existing under the said acts of 1865 and 1868, and also in the said lease of 1872.

Thirteenth: And your orator further shows that the said bonds for $700,000 loaned by said County of St. Louis to the Pacific Railroad in January, 1865, were sold by the Pacific Railroad, and the proceeds were applied by the Pacific Railroad to build bridges, and repair the said railroad and depots, and the statutes of 1865 and 1868 gave notice of said equitable lien and statutory lien to all the world and to the trustees and mortgagees in this suit, and both as an equitable lien and as a statutory lien it has precedence over all liens and mortgages made or executed subsequent to the 31st day of March, 1868, and has priority over the mortgage complainants seek to foreclose in this suit.

Fourteenth: Your orator further shows that, from and after the date of the execution and delivery of said 700 bonds of

$1,000 each, the monthly installment of interest of $4,000 per month, including $1,000 additional for the month of December, so due snd payable as aforesaid under the terms and conditions of said act of January 7, 1865, and the terms of said contract made pursuant thereto, were paid from time to time, up to and including the month of May, 1875, but that no payment has been made for the months of June, July, August, September, October, November, December, 1875, or for the months of January, February and March, 1376, and that the amount of interest on said loan now due the County of St. Louis from said Pacific Railroad (except for the present month of April, 1876, and which is also unpaid,) amounts to $41,000.

Fifteenth: Your orator further shows that, by reason of the premises, there exists a statutory lien and charge under said acts of January 7, 1865, 1855, 1857 and 1868, the said lease and contracts made in pursuance thereof, and an equitable lien under the statute of which public notice is given by the statutes to all the world, in favor of the County of St. Louis upon all the earnings of said Pacific Railroad, that the same is prior to all other liens upon said road of every kind and description whatsoever, and that the same is entitled to a preference of payment over all other charges and demands against said Pacific Railroad.

Sixteenth: The County of St. Louis, as intervenor, further shows that in this cause, on 8th day of April, 1876, an order was made appointing Joseph L. Stephens, John H. Beach and Oliver Garrison, citizens of Missouri, receivers of the Missouri Pacific Railroad in this cause; that by virtue of their office they have been since said last-mentioned date, and now are, in possession and operating the said Pacific Railroad, receiving and having custody of the funds of said Pacific Railroad Company. Wherefore, the intervenor prays that its said lien claimed for said interest so due as aforesaid, amounting as aforesaid, to $41,000, and the said sum of $700,000 herein mentioned and claimed as being a lien statutory and equitable, may be established by this Court; that said Pacific Railroad Company be required to answer this intervening petition; that cause may be shown, if cause there be, why the relief prayed for may not be granted; and this intervenor prays for an order that said

receivers be required to pay this intervenor's claim out of the earnings of said Pacific Railroad in their possession as such receivers, and for such other and further relief as to equity and good conscience appertains, and as this Court shall deem meet

The intervening petition was demurred to as containing no cause of action, which demurrer was overruled and Judge Dillon's opinion on the demurrer appears in the record (p. 83.) The parties to the suit then filed an answer (p. 46) to the intervening petition which raises issues broad enough to cover all the matters of fact subsequently found by the Master in his report of the evidence. The answer was replied to and the case of the intervenor was referred to the Master for examination and report upon the facts.

The evidence and the finding of facts by the Master assume some latitude which was necessitated, as these appellants thought, by the fact that the Court, in overruling the demurrer to the intervening petition, had declared (p. 85) that "the intention of the parties must be gathered from the language of the act of January 7, 1865 and the resolutions and acts of the company and the county in executing the authority it conferred; these being viewed in the light reflected upon them by the known circumstances surrounding the parties and the object which was intended to be accomplished."

So that the purpose of the evidence given before the Master was in large part to show that the Circuit Court in passing upon the demurrer had, in the main, misconceived the actual circumstances surrounding the parties, and the object which was intended to be accomplished in the making of the loan of $700,000 by St. Louis County to the Pacific Railroad.

The magnitude of the controversy also seems to justify an elucidation of every point which may bear upon the legal or equitable merits of the case.

The Master's report to the findings of which, no exceptions were taken by either party is as follows (p. 57.):

MASTER'S REPORT.

To the Honorable, the Judges of said Court:

Scope of Order of Reference.

This intervening petition was referred to the undersigned, one of the Masters in Chancery of this Court, by an order of Court dated the twentieth day of January, 1877, "for examination and report upon the facts therein."

The evidence Transmitted.

The evidence submitted and herewith returned into Court embraces: First, the testimony taken in my office, fifty-five pages, marked "Exhibit A, to Master's Report;" secondly, a document containing the depositions of Francis A. Fogg, William H. Coffin, Darius R. Mangam and Andrew V. Stout, taken in New York, which document is marked "Exhibit B. to Master's Report;" thirdly, twenty-one documents offered and received in evidence and marked Exhibits 1 to 21 inclusive, Exhibit 20 including sub-exhibits A to S inclusive.

Pleadings, etc., in the principal case considered in evidence.

At the request of counsel for the Respondents, I have considered as a part of the record herein the following designated pleadings and papers in the principal case (George E. Ketchum, *et al.* v. The Pacific Railroad *et al.*), to-wit:

1. The bill of complaint of George E. Ketchum, filed November eleventh, 1875;

2. The answer of the Pacific Railroad filed February seventh, 1876.

3. The order of this court appointing receivers of the Pacific Railroad dated April third, 1876;

4. The answer of Durkee and Lackland filed June fifth, 1876;

5. The answer of Murdock, Clark, Morgan, Seligman and Baker, filed June fifth, 1876;

6. The decree of foreclosure made on June sixth, 1876;

7. The final order of the court directing Seymour D. Thompson, Esq., Master in Chancery, to make a deed of the property covered by the third mortgage to James Baker, the purchaser at the foreclosure sale, which order is dated October fourth, 1876;

8. A copy of the deed of Seymour D. Thompson, Esq., Master in Chancery, to the said James Baker, which copy by con-

sent of counsel was received in lieu of an exemplification of the original, and is identified as Exhibit No. 21.

Scope of this report.

The order of reference seems to contemplate that I should make a finding of the facts in the nature of a special verdict; but that I should not express any opinion in the nature of a conclusion of law upon these facts. In making this finding, as well as in the admission of testimony, I have felt obliged to conform to the issues as made in the pleadings sent down to me, without reference to the question whether some of these issues may not be irrelevant to the case. After consultation with counsel it is thought best that this finding should be sufficiently full to contain a clear exposition, in historical order, of the facts bearing upon the transaction in controversy, and of those which are calculated to throw light upon the intention of the parties.

I find the following facts:

St. Louis County.

First: That this intervenor, the County of St. Louis, is a municipal corporation and a political subdivision of the State of Missouri, duly organized under the laws of said State, with full power, under the laws thereof, to sue and be sued, plead and be impleaded.

The Pacific Railroad.

Second: That the Pacific Railroad is a corporation duly organized under the laws of Missouri, and was, at the several times mentioned in this report, and until October twenty-fourth, 1876, the owner of the Pacific Railroad of Missouri, subject to the mortgages hereinafter set forth,—a railroad extending from the City of St. Louis, in said State, westward to Kansas City on the Western boundary of the State.

Charter of; State aid to.

Third: That the Pacific Railroad was chartered in the year 184- by the Legislature of the State of Missouri, with power to build a line of railway from the City of St. Louis to Kansas City on the Western boundary of said State; that in the year 1851, and in subsequent years the said Railroad Company received such aid from the State of Missouri that, as early as the year 1855, the Legislature had passed acts loaning the credit of the State to the Company to aid and secure the completion of the road, in the shape of State bonds, the interest and principal of which the company had agreed to pay, to the extent of about $7,000,000.

Fourth: That on the 10th day of February, 1864 [Laws of 1864, p. 50], the Legislature passed an Act, the first section of which reads as follows: "The Pacific Railroad Company is hereby authorized to borrow money for the completion of the main road to Kansas City, and for this purpose may issue not more than one thousand five hundred bonds, of one thousand dollars each, bearing interest at the rate of not more than seven per centum per annum, with coupons attached, and having four, five and six years to run, in equal proportions; said bonds to be secured by a first mortgage on the main line of the road west of Dresden; and as much of the proceeds of said bonds as may be necessary, shall be applied to the completion of the road from its present terminus to Kansas City and to no other purpose; said bonds shall only be negotiated or sold, as the money is required for the payment of work done or under contract. *Provided, however*, that all of any one class of bonds may be sold at one time; and the state of Missouri, for this object and to this amount and extent only, hereby relinquishes her first lien and mortgage and right of forfeiture upon said road west of Dresden, retaining, however, a second lien and mortgage thereon, such second lien and mortgage to become forthwith the first lien and mortgage in every respect, and as fully as now held by the State, upon the payment in full of principal and interest of the bonds authorized by this act. All the net profits of the road shall be applied to the extension and equipment thereof until completed as aforesaid, reserving, however, sufficient for the payment of the interest accruing semi-annually on said bonds actually sold; and after completion of the road, any surplus over the accrueing interest shall be applied to the purchase or payment of the bonds themselves. *Provided:* that no sale of the road West of Dresden, as aforesaid, or any interest therein, or therewith connected, on account of the non-payment of such interest or principal, shall be made, before notice in writing of such failure has been first given to the Governor and Secretary of State, and until twelve months shall have elapsed after such notice, before such sale. *And it is further provided*, that the State, through the Governor or any agent appointed by the General Assembly of the State, shall have the right to redeem said railroad from any sale under the provisions of this act by the bondholders or mortgagees, or buy in the same at any such

The Dresden Bonds. Act of Feb. 10, 1864, § 1.

"The Dresden Bonds."

Act of February 10, 1864, § 1.

"The Dresden bonds." Act of Feb. 10, 1864, § 1.

sale; and upon the payment, or tender of payment, of the amount of such mortgage, with interest by the State, all the rights and privileges of the Pacific Railroad Company in and to said railroad, depots, lands, rolling stock, machine shops and other appurtenances, shall be vested in the State, and the Governor of the State shall take possession of the said road, without any suit or sale."

The Fund Commissioner.

Fifth: By the second section of said Act, the office of *Fund Commissioner* was created, the material provisions being as follows:

Act of Feb. 10, 1864, § 2.

"The office of Fund Commissioner is hereby created, and shall continue until the bonds issued for the completion of the road, and the State bonds loaned to said railroad company, with interest thereon, are fully paid out of the earnings, or exchanged for the first mortgage-bonds of said road as hereinafter provided. * * * Within sixty days from the passage of this Act, the Directors of the Pacific Railroad Company shall cause said Act to be submitted to the stockholders thereof for acceptance, and if the same is accepted by a majority of the said stockholders in interest, the directors shall immediately certify such acceptance in writing to the Secretary of State."

That section 3 of said Act provides as follows:

Ibid., § 3.

"The Pacific Railroad Company are hereby required to deliver to said Fund Commissioner, within a reasonable time after he shall be appointed and qualified, the bonds of the company hereby authorized to be issued, to the amount aforesaid, in bonds of one thousand dollars each, having four, five and six years to run, in equal proportions, and bearing interest at a rate not exceeding seven per centum per annum, with coupons attached, payable semi-annually at the Bank of Commerce in the City of New York; whereupon, in order to give validity to such bonds, the State relinquishes to that extent, and for that object solely, as aforesaid, her first lien and mortgage upon said road west of Dresden, as aforesaid. * * * All gross earnings of said road, from all sources, shall be paid in daily to said Fund Commissioner, and all other sources of revenue, belonging to or connected with said railroad, shall be under his control, and be taken into his possession as they arise, and be deposited daily in the institution or bank aforesaid."

Partial relinquishment of State's lien.

Powers of Fund Commisioner.

That by section 4 of said Act the duties of said Fund Commissioner are further described as follows:

His duties.

"Said Fund Commissioner shall, out of all moneys arising from the sale of bonds, as aforesaid, upon proper vouchers, pay for the construction of the extension and equipment of said road, as aforesaid; and out of all other moneys derived from other sources, as before designated, in his hands and under his control, upon proper vouchers and receipts, he shall pay for the operating of the road; the payment for said construction and equipment shall be made upon the vouchers of the Chief Engineer of said road, approved and countersigned by the President, specifying in detail the amounts and character thereof; and the payment of operating the road shall be made upon the vouchers and certificates of the superintendent of the road, approved by the President and Chief Engineer."

That, by section 7 of said Act, it is made the duty of the said Fund Commissioner "to apply the net earnings of the road, after paying the expenses of his salary, first, as provided in section one; second, to the payment of interest as the same shall become due and payable on the first-mortgage bonds issued and exchanged, as provided in section six; and next, not to exceed six per centum dividend on the preferred stock, as provided in section eight; and the surplus, if any, to the purchase of the outstanding State bonds, with interest coupons thereon, at the best market rates."

"The Dresd Mortgage."

Sixth. That in pursuance of the authority so granted, the Pacific Railroad, by a deed* dated April 1st, 1865, mortgaged all that portion of its road extending from Dresden, in the County of Pettis, to Kansas City, on the western boundary of the State of Missouri; which mortgage purported to be a first mortgage on that portion of the road, made to secure bonds to the amount of $1,500,000, bearing interest at the rate of seven per cent. per annum, one-third of said bonds maturing in four years, one-third in five years, and one-third in six years, respectively, from the first day of April, 1864, the date of the said mortgage.

*Exhibit H Master's R cord.

Office of Fu Commissior in existence 1865.

Seventh. That the office of Fund Commissioner created by this Act was in existence, and that said officer was in custody of the earnings of the Pacific Railroad on the seventh day of Jan-

uary, 1865, the date of the passage of the Act authorizing the loan of the bonds by the County of St. Louis here in controversy, and also on the eighteenth and nineteenth days of January, 1865, the date of the order of the County Court of St. Louis county, authorizing the loan of said bonds, and of the resolution of the Board of Directors of the Pacific Railroad accepting said loan under the terms and conditions thereof; which statute, order, and resolution, respectively, are hereinafter recited.*

The office was abolished by the Act of March 31, 1868, § 12.

ock of St. Louis County, City, and Tax-payers in Pacific Railroad.

Eighth. That on the thirty-first day of December, 1855, the County of St. Louis subscribed and paid for 5,000 shares of the capital stock of the Pacific Railroad, for which it paid the par value, namely, $100 per share; that the county continued to own stock, and to be a stockholder in the Pacific Railroad until the twentieth day of November, 1869, when it disposed of the same to Hudson E. Bridge for $250,000. That on the first day of December, 1854, the City of St. Louis subscribed for five thousand shares of the capital stock of said Pacific Railroad, representing $500,000, on which there was a stock dividend of five hundred and seventy (570) shares; that on the twelfth day of April, 1856, three hundred (300) shares more of said stock were issued to said City of St. Louis, making an aggregate of 5,870 shares of $100 each, representing in all $587,000; that on the thirty-first day of January, 1870, the said City of St. Louis transferred this stock to Joseph Brown and William Taussig; that in the early part of the year 1857, or thereabouts, the County of St. Louis, on behalf of its tax-payers, subscribed for 12,000 shares more of said stock, representing in the aggregate the sum of $1,200,000; that on May thirty-first, 1865, there remained unissued of this stock 6,795 shares, and that there still remain unissued of the said stock 2,000 shares, representing the par value of $200,000. That by an Act of the Legislature passed March 14th, 1859 (section 25), the Board of Commissioners for St. Louis county were required to cast the vote of the stock of said county for directors of the Pacific Railroad at the times fixed for the election of such directors, but were prohibited from taking into account or assuming to represent the shares of stock of the Pacific Railroad, for which the County Court subscribed on behalf of said county in the year 1854, "for

oting said stock.

which the tax-payers have paid by a direct tax, and for which such tax-payers are entitled to certificates on presentment of their railroad tax receipts;" that the officers of the Pacific Railroad, in pursuance of the said Act of the Legislature, have refused to permit the County of St. Louis to vote or represent at meetings of stockholders any of the stock which belongs to citizens as tax-payers of the county; and it is admitted that the said stock never was represented by the County Court, and that, under the above Act, the County Court had no authority to represent it. That in the fall and winter of 1872, or in the spring of 1873, this stock acquired a value of $115 a share.

Ninth. That on the twenty-third day of December, 1864, William M. McPherson, Hudson E. Bridge and Adolphus Meier, composing a committee of the Board of Directors of the Pacific Railroad, appointed for the purpose hereinafter expressed, presented to the County Court of St. Louis county a memorial* which opens with the following language:

Memorial of Pacific Railroa

*Sub-Exhibit to Exhibit 2

"At a late meeting of the Board of Directors of the Pacific Railroad, the undersigned were appointed a committee to confer with your honorable body in relation to the present condition and prospects of the Pacific Railroad, and to ask the aid of the county in completing this work, so important to our State, and of especial interest to the city and county of St. Louis." Said memorial then proceeds to describe specifically the destruction of the property of the Pacific Railroad which had taken place in consequence of an invasion of the State by insurrectionary forces under command of Gen. Price, in the September preceding; and the memorialists estimate the cost of repairing such destruction, and completing the road and putting the same in successful operation, at the sum of $700,000. The memorial then proceeds as follows: "This sum we have lost as the result of the invasion. This amount we want the county to provide, by issuing to the company the bonds of the county (under authority to be given by the Legislature), bearing seven per cent. interest, the same to be a loan to complete the road, the company to refund to the county the principal and interest as the same matures.

Destruction the road Price's raid.

Amount asked for.

"We make this application under the belief that the great value of a completed road to the city and county of St. Louis

Reasons for making the application.

Reasons for making the application.

would justify the expenditure, even if it should never be returned in money by the company.

"We ask it because, for the reasons above stated, we must raise this much money or let the work stop where it is, and our people lose all the benefits to result from a completed road.

"We ask this of the county, because the city and county of St. Louis, in their corporate capacities, own nearly one-half of the stock of the company, and therefore every citizen is interested in the completion of the road, as a means of enhancing the value of the stock.

"Although we are directors of the road, sent before you to make known the wants of the company, yet our interest as tax-payers is much greater than any interest we hold individually in the road; and we could not feel justified in asking this aid from the county if we did not believe that the best interest of every tax-payer in the county was to be promoted by the early completion of the road. We are not before you seeking to promote private and selfish ends, but we claim to come as the representatives of a great public enterprise, of such magnitude as to interest in common every tax-payer in the county.

"We want the loan of seven hundred thousand dollars, and we have shown for what purpose it is wanted. We are aware that a less sum has been spoken of, but a less sum will not complete the road. If, as we assume, a common interest requires the completion of the road, there is no use in driving hard bargains with ourselves, or delay the completion of the work by a blind economy. With the sum asked for the road can be opened to Kansas City, if protected from further hostile interference, as we *now* feel confident it will be. It is true that money to complete the track does not supply all our wants. We shall, for the extended road, need twenty new locomotives (which have been contracted for); we shall want six new passenger cars, eighty more flat cars and fifty box cars, costing in the aggregate seven hundred [thousand] dollars. To procure this necessary rolling stock, we must rely upon the earnings of the road and the individual credit of the directors.

"We have full confidence in the future of the road if hastened to completion before more enterprising rivals shall divert the trade.

"If completed, we believe that the earnings of the road will soon furnish all the equipments required for the increased business, pay off the $1,500,000 mortgage, provide for the payment of the county bonds now asked for, and, in six or seven years, commence paying on the bonds issued by the State for our benefit. But should the financial success of the enterprise not equal our expectations, the importance of the road as a great artery of trade and commerce will fully justify the expenditure asked for. All of which is respectfully submitted.

WM. M. MCPHERSON,
HUDSON E. BRIDGE,
ADOLPHUS MEIER."

Tenth. That this memorial was taken under advisement by the County Court on the day it was presented, and on December twenty-ninth, 1864, the following proceedings were had in said Court in reference thereto: Action of the County Court.

"STATE OF MISSOURI, } ss.
County of St. Louis. }

"IN THE COUNTY COURT OF ST. LOUIS COUNTY.

"*DECEMBER TERM.*

"THURSDAY, December 29th, 1864.

"PACIFIC RAILROAD:

"The Court this day takes up the application of the Pacific Railroad for the issuing of $700,000 St. Louis County bonds to aid in the completion of said road. Whereupon, Mr. Justice Fisse submits the following for the action of the Court, viz:

"WHEREAS, The Directors of the Pacific Railroad Company have submitted to the Court their memorial setting forth the condition of the company, as well as the injury done it by the recent rebel raid into our State, by the destruction of so large a portion of its property, and praying the Court to issue, under authority to be obtained, $700,000 St. Louis County bonds, to be loaned to the said company, in aid of completing the road to Proposition of Mr. Justice Fisse.

Kansas City; the committee, in their verbal explanations, promising that the company would be prepared to pay all interest accruing, as well as the bonds when matured. And after a mature and deliberate consideration of the questions therein set forth, and appreciating the necessity of the early completion of the road, as also the benefits to accrue to St. Louis County thereby:

It is ordered by the Court that they will not be adverse to issue St. Louis County bonds to the amount of $700,000 in aid of completing the Pacific Railroad to Kansas City, if the following conditions are embodied in the law to be passed for that purpose:

"1. The County Court to be authorized to issue $700,000 St. Louis County bonds in aid of the Pacific Railroad Company, the proceeds of which shall be used for no other purpose than completing the road to Kansas City. The bonds to become due and payable in the city of New York, twenty years after date, bearing seven per cent. interest, payable semi-annually at the same place.

"2. The State to relinquish so much of the mortgage on the road, as covers the rolling stock, which shall then be mortgaged by the Company to the County of St. Louis as security for the $700,000 bonds issued.

"3. That the Company shall pay into the County Treasury, at least thirty days prior to the time the semi-annual interest shall become due and payable, the full amount of such interest; and in the event of the Company failing to pay into the County Treasury as above specified, then the whole debt to become due, and the County Court empowered and instructed to foreclose the mortgage.

"4. The Act to be submitted to the voters of Saint Louis County for their acceptance or rejection; and only those who are actual tax-payers shall be entitled to vote at such election."

Proposition of Mr. Justice Taussig.

"Whereupon Mr. Justice Taussig offers the following substitute:

"In the matter of the application of the Pacific Railroad to issue $700,000 bonds, etc., it is ordered, in view of the importance of the completion of this road to the tax-payers of this

County, that this Court will concur (in case application should be made by said Pacific Railroad) in the propriety of the passage of the following Act, securing the completion of said road and the interest of the County of St. Louis in the issue of said bonds.

Proposed act of Legislature.

"*Be it enacted by the General Assembly of the State of Missouri*, That the County Court of St. Louis County is hereby authorized to issue seven hundred bonds of one thousand dollars each, having twenty years to run, and bearing interest at seven per cent. per annum, payable semi-annually in the City of New York, and loan said bonds to the Pacific Railroad Company for the completion of said road. Said bonds to be issued under such conditions as may be agreed upon between said County Court and the Board of Directors of the Pacific Railroad; and the Fund Commissioner of the Pacific Railroad Company shall pay every month four thousand dollars, and one thousand dollars additional in each month of December, to the Treasurer of St. Louis County, to meet the interest on the above seven hundred bonds; said payments to continue until said bonds are paid by the Pacific Railroad Company.

Amendment of Justice James.

"Whereupon, Justice James offers the following amendment: Provided, that no bonds shall be issued, unless the question of said issue shall first have been submitted to a vote of a majority of the voters of St. Louis County."

"Which amendment the Court overruled, Justices Alt and James voting in favor of the amendment, and Justices Able, Charles, Fisse, Yore and Taussig against the amendment.

"And thereupon, a vote being taken upon the proposition offered by Justice Taussig, as herein above set forth, the same was concurred in by the Court by the following vote: Ayes—Messrs. Able, Charles, Yore and Taussig. Nays—Messrs. Alt, James and Fisse."

Act of Jan. 7, 1865.

Eleventh: That on the seventh day of January, 1865, the Legislature of the State of Missouri passed an act entitled: "An Act authorizing the County of St. Louis to issue bonds:" which act is in words and figures following, to-wit:

Section 1.

§ 1. The County Court of St. Louis County is hereby authorized to issue seven hundred county bonds of the denomination of

one thousand dollars each, having twenty years to run, and bearing interest at the rate of seven per cent. per annum, payable in the City of New York, and loan said bonds to the Pacific Railroad Company for the completion of said road; said bonds to be issued under such conditions as may be agreed upon between said County Court and the Board of Directors of the Pacific Railroad Company; such condition to be binding on the parties, but shall not impair or affect the validity of the bonds after they are issued.

Section 2.

"§ 2. The Fund Commissioner of the Pacific Railroad, or such person as may at any time hereafter have the custody of the funds of said Railroad Company, shall, every month after said bonds are issued, pay into the County Treasury of St. Louis County, out of the earnings of said Pacific Railroad, four thousand dollars, and one thousand dollars additional in each month of December, to meet the interest on the said seven hundred bonds; said payments to continue until said bonds are paid off by the Pacific Railroad."

Opinion of Geo. E. Leighton, Esq.

Twelfth: That thereafter, on the tenth day of January, 1865, the President of the Pacific Railroad presented to said County Court a written opinion of George E. Leighton, Esq., an attorney-at-law, which opinion is in words and figures following, to-wit:

(This opinion is copied in full in the intervening petition and so is not repeated here.)

Finding as to this communication.

I find that this communication related to the matter here in controversy, and not, as the respondents allege in their answer, "solely to the rights of the railroad company as bondholders as against the State." There is no direct evidence that the said communication was ever exhibited to the justices of the County Court or taken into consideration by them in making up their decision in the premises; but this is to be inferred, I think, from the fact that it was filed and preserved by the clerk of the County Court among the records thereof, and that it was apparently drawn up with the view to influence the judgment of the County Court in the premises.

Opinion of Henry A. Clover, Esq

Thirteenth. I find that thereafter, on the fourteenth day of January, 1865, Henry A. Clover, Esq., then and there being the County Counselor for St. Louis County, addressed and delivered in his capacity as such County Counselor, to the Hon. John H. Fisse, then and there being chairman of the said County Court, an opinion in words and figures following, to-wit:

"ST. LOUIS, January 14, 1865.

"HON. JNO. H. FISSE:

"*Dear Sir:*

"Your note of this date, enclosing a copy of a certified copy of an act authorizing the County of St. Louis to issue bonds to the amount of seven hundred thousand dollars, and to loan the same to the Pacific Railroad, is before me.

"You therein desire my opinion upon several propositions as to the legal effect of the second section of the act, and if (whether) the payments therein fixed, are secured to the county beyond all contingencies until such times when the bonds themselves may be paid by the Pacific Railroad Company.

"The second section of the act is brief enough for me to here transcribe. It reads thus: 'The Fund Commissioner of the Pacific Railroad or such person as may at any time hereafter have the custody of the funds of said railroad company shall every month after said bonds are issued pay into the County Treasury of St. Louis county and out of the earnings of said Pacific Railroad four thousand dollars, and one thousand dollars additional in each month of December, to meet the interest on the said seven hundred bonds. Said payments to continue until said bonds are paid off by the Pacific Railroad.'

"The first matter which strikes my mind is that no provision whatever is made for the payment of the bonds themselves, or as to how, or out of what fund they are to be paid, or what security is offered beyond the responsibility of the railroad for their payment when due.

"As to whether the payments of the interest are secured beyond all contingencies, I would say that by virtue of an act for the *extension* and *completion* of the Pacific Railroad to the

Opinion of H. A. Clover, Esq.

western boundary of the State, at Kansas City, and the North Missouri Railroad to Iowa state line, to complete the southwest branch of the Pacific Railroad, and to reduce the State indebtedness, approved February 10th, 1864, the company is authorized to borrow one million five hundred thousand dollars on its bonds, having four, five and six years to run in equal proportions. Said bonds to be secured by a first mortgage of a part of the main line of the road, the State relinquishing her first lien and mortgage and right of forfeiture upon that part of the road. All the net profits of the road, it is provided, shall be applied to the extension and equipment thereof until completed, reserving, however, sufficient for the payment of the interest accruing semi-annually on the bonds which should be sold, and after the completion of the road any surplus over the accruing interest shall be applied to the purchase or payment of the bonds themselves.

"Further, out of the gross earnings of the road, from all sources, and all other sources of revenue belonging to, or connected with said railroad, the Fund Commissioner is to pay for the operating of the road; and of the net earnings of the road, after paying the expenses of his salary, he is to apply those earnings to the extension and equipment of the road, reserving however sufficient for the payment of the interest accruing semi-annually on the bonds authorized by the act, which might or should be actually sold, and after the completion of the road any surplus over the accruing interest is to be applied to the purchase or payment of the bonds themselves; second, to the payment of the interest as the same shall become due and payable on the first-mortgage bonds issued and exchanged, as provided in section six of said act; and next not to exceed six per centum dividend on the preferred stock as provided in section eight of the act; and the surplus, if *any*, to the purchase of the outstanding bonds, with interest coupons thereon, and at the least market rates.

"This comprises all the directions to the Fund Commissioner as to the disposition of all the moneys which shall come into his hands, except moneys arising from the sale of bonds authorized by the act, which moneys are to be by him applied to the construction and equipment of the road.

"Now, on the seventh of January, 1865, the Legislature enacts a law requiring the Fund Commissioner out of the *funds* of the company to pay a sum of money to meet the interest on other bonds which are by the act authorized to be issued. And the question may be asked under which enactment is the Fund Commissioner to proceed—to apply the moneys coming to his hands as directed by the Act of February 10, 1864, or as directed by the Act of January, 1865. Opinion of H. A. Clover, Esq.

"The bondholders under the act of 1864 have two securities for the repayment of their money; first, a mortgage upon a portion of the main line of the road; and second, the net profits of the road.

"These securities are clearly given in the act, and the bondholders have undoubtedly a right to look to both securities. They may have loaned their money upon the faith of both securities. They probably did look to the mortgage for the payment of their indebtedness, and to the net earnings of the road for the payment of the interest upon their indebtedness.

"Can the Legislature divert this fund, or any portion of this fund, to the securing of subsequent creditors who contract with a knowledge that the security which they accept has been already pledged to another and earlier creditor?

"That is the question.

"It strikes me very forcibly that there is a contract between the bondholders and the company, which contract is authorized and sanctioned by the Legislature and which forbids that body from impairing the obligation of a contract by the passing of this act, with or without the will of the company.

"Wherefore I conclude that the payments fixed in the 2d section of the act, upon the proper construction of which you have asked my opinion, are not secured to the county beyond all contingencies at all, until the time when the same may be paid by the Pacific Railroad. The County without security.

"You ask further, what would be the effect upon the security if the State, at any time after the year 1870 and prior to the time of the maturity of the bonds, should foreclose the first mortgage and sell the road to a new company. And you ask Opinion of H. A. Clover, Esq.

Opinion of H. A. Clover, Esq.

further, would the second section of the act referred to be binding upon such new company, and if not, to whom could the county look for the payment of said bonds.

"To which I answer, if the State sells the road under a prior mortgage to a new company, the security given by the act will be lost; the purchaser, under the mortgage, would not be bound by the provisions of the Act of 1865, and the county could look to nobody in particular for the payment of the bonds, though the State might, under the circumstances, feel an obligation to refund to the county in the case supposed.

"You ask, in conclusion, what steps will be necessary to make the act, if accepted by the Court, binding upon the Pacific Railroad.

"To which I can hardly make reply. The act, if acceptable to the County Court, is binding upon the Pacific Railroad; but how binding the obligation may be, is a different question.

"I suppose if the bonds are issued and loaned, the ultimate dependence for their payment, principal and interest, lies in the responsibility of the company, present and future, in its ability to pay—if it is able, it can be compelled to; otherwise, of course not.

"I am respectfully,
"Your obedient servant,
"H. A. CLOVER."

And that the said opinion was by the said Fisse laid before said Court.

Order granting the loan Jan. 18, 1865.

Fourteenth. That thereafter, on the eighteenth day of January, 1865, an order was adopted by the said County Court of St. Louis County, in words and figures following, to-wit:

"STATE OF MISSOURI, } 88.
County of St. Louis. }

"IN THE COUNTY COURT OF ST. LOUIS CO.

"*JANUARY TERM*, 1865.

WEDNESDAY, January 18th, 1865.

"Ordered by the Court:

"The provisions of an Act of the General Assembly of the State, entitled 'An Act authorizing the county of St. Louis to issue bonds,' approved January 7th, 1865, is hereby by the county

of St. Louis accepted, and upon the passage of a resolution of the Board of Directors of the Pacific Railroad, binding them likewise to the provisions of said act, an issue of bonds of the county to the number of seven hundred, each of the denomination of one thousand dollars, having twenty years to run, and bearing interest at the rate of seven per cent. per annum, payable in the city of New York semi-annually, is hereby ordered, which are to be delivered to and loaned by the county to the Pacific Railroad for the completion of said road. And the Pacific Railroad is likewise required by the action of its Board and authorities to assume the prompt payment of said bonds at their maturity, so that the same may constitute a legal indebtedness on the part of said Pacific Railroad to the county of St. Louis for the bonds hereby ordered to be issued and loaned. The said bonds are to be sold upon such terms as this Court or its presiding officer may agree upon.

Order granting the loan Jan. 18, 1865.

"Whereupon Mr. Justice Fisse proposed the following amendment, to-wit:

Amendment of Mr. Justice Fisse.

"But no bonds shall be issued until the question has been first submitted to the qualified voters of St. Louis County for their acceptance or rejection, at a special election to be held for that purpose on the first Monday of February next, and the majority of the votes then cast shall be in favor of issuing said bonds as above stipulated.

"Which amendment the Court refused to adopt by the following vote:

Rejected.

"For the amendment, Justices Alt, Fisse and James. Against the amendment, Justices Able, Charles, Yore and Taussig.

"Whereupon the Court adopt the order submitted by the committee as aforesaid, by the following vote, and declared to be the order of this Court:

"In favor of the order, Justices Able, Charles, Yore and Taussig. Against the order, Justices Alt, Fisse and James."

Fifteenth. That thereafter, on the nineteenth day of January, 1865, the Board of Directors of the Pacific Railroad passed a resolution in words and figures following, to-wit:

"Office of the PACIFIC RAILROAD,
"ST. LOUIS, *January* 19, 1865,

The terms of the loan accepted by the Pacific Railroad.

"At a meeting of the Board of Directors of the Pacific Railroad, held this day at their office in the City of St. Louis, the following resolution was adopted:

"'*Resolved:* that the Board of Directors of the Pacific Railroad unanimously accept of the terms, provisions and obligations set forth and contained in an act of the General Assembly of the State of Missouri, entitled 'An act authorizing the County of St. Louis to issue bonds,' approved January 7, 1865, to be observed and faithfully performed by this Company, and that the president be and he is hereby instructed to execute an agreement under the seal of the Company, obligating the said Company to promptly pay, at maturity, the said bonds authorized to be issued by said act.

"'*Resolved, further*, that this Company accept of the terms and provisions of an order of said County Court, now here present and certified by the clerk of said Court under its seal, and hereby obligate the Company to an observance and faithful performance of all the provisions contained therein.'

"I, John C. Porter, Secretary of the Pacific Railroad, hereby certify that the preceding is a true copy of the resolution adopted by the Board of Directors of the Company, as the same appears upon the records of said Railroad.

"In testimony whereof, I have hereunto set my hand and affixed the corporate seal of said Pacific Railroad.

[SEAL.] "JOHN C. PORTER,
"*Sec'y Pacific R. R.*"

Letter of the President of the Pacific Railroad.

That said resolution was, on the twenty-fourth day of January, 1865, transmitted by the President of the Pacific Railroad to the said County Court, in a letter, in which he, the said president, used the following language: "I shall be at all times ready

to execute on behalf of this company such instruments of writing as shall be necessary to perfect the orders of your Honorable Court and this Company in the premises;" that the said resolution was, on the 26th day of January, 1865, filed among the records of the said County Court, and referred to the Committee on the Pacific Railroad and the County Counselor, with instructions to report articles of agreement between the County and said Railroad Company relative to the bonds therein mentioned.

Letter of the President of the Pacific Railroad.

Sixteenth: That thereafter, on the 30th day of January, 1865, the County Counselor of St. Louis county, H. A. Clover, Esq., addressed to the said County Court a letter containing the following language:

Letter of H. A. Clover, Esq. "Nothing further is needed to bind the Pacific Railroad," etc.

"ST. LOUIS, MO., *January* 30th, 1865.

"*To the Hon. County Court of St. Louis County:*

"GENTLEMEN:

"In my opinion nothing further is needed to bind the Pacific Railroad in the matter of loan of seven hundred of the bonds of the County to the said Company for the completion of said road. The resolution of the Company of the 19th inst. obligates it to an observance and faithful performance of the provisions of the order of the Court of the 18th inst., for the prompt payment of said bonds at their maturity.

"Respectfully, &c.,

"H. A. CLOVER."

Which communication was concurred in by a committee of the said Court, composed of Justices William Taussig, Benjamin Charles and John E. Yore, and which report the Court did, by an order then and there made and entered of record, approve.

Concurred in.

Seventeenth: That thereafter, in pursuance of the authority granted by the act of the Legislature of the State of Missouri hereinbefore recited* and the order of the County Court of St. Louis County, dated the 18th day of January, 1866, hereinbefore set forth; there was executed and delivered by the County of St. Louis 700 bonds of $1,000 each, each of the description set forth in the said order, which said bonds were received by

The bonds delivered.

*Act of Jan. 7, 1865.

the Pacific Railroad in amounts as follows, that is to say: 100 bonds on the 20th day of February, 1865; 200 bonds on the 7th day of March, 1865, and 400 bonds on the 5th day of May, 1865; which said bonds were afterwards sold by said Pacific Railroad and the proceeds realized therefrom used in the completion of said Pacific Railroad.

Testimony of William Taussig — Why a mortgage was not taken.

Eighteenth. I am requested by counsel for the respondents to embody in this report a synopsis of the testimony of William Taussig, who, at the time this loan was made, was one of the Justices of the County Court of St. Louis County. Both parties seem to consider this testimony as of value to them; but, after reading it carefully, I do not attach much importance to it, and deem it best not to encumber this report with an abstract of it. It will be found in my record herewith submitted,* the material portion of it commencing near the bottom of page 27. The chief point in it is, that the County Court was appealed to to make this loan, not only by a committee representing the directory of the Pacific Railroad, but also by "a very large delegation of citizens;" that after several meetings, in which various expedients were discussed, it was deemed impracticable for the County to obtain an absolute security, and the security which was obtained was deemed the best that the circumstances would admit of. He is positive in his statement that the County Court was more influenced by the committee of citizens than by the owners of the road. He says: "We intended to get the best possible security without crippling the road and without defeating the object, and enabling it at the same time to finish that piece of the road; because, in our opinion, any stronger condition which we would have required would have been simply nugatory—might as well have done nothing at all. The Fund Commissioner being a State officer, and he having charge of the funds, the security was really considered a State security. * * * * Of course we did not know what the Legislature would do afterwards. We were not dependent upon the goodwill of the road, but upon the integrity of the State officer."

*Exhibit A to Master's Record.

Facts occurring subsequent to the loan.

The intervening petition avers that the claim of the County of St. Louis has always been recognized as a statutory lien, while the answer of respondents, denying the allegations of the

intervening petition, aver that it has always been considered and recognized by the State of Missouri, the County of St. Louis and the Pacific Railroad, that the County of St. Louis has no lien whatever, and that said County, State and Railroad corporation represented to the purchasers buying under the mortgages represented by the respondents, that the County had no lien whatever. As pertinent to these issues made in the pleadings referred to me, I find the following facts occurring subsequently to the making of the loan:

Description of the loan of St. Louis County in "Financial Statement" of 1866.

Nineteenth. That on the thirtieth day of November, 1866, the Pacific Railroad issued a printed "Financial Statement," in which its contracted indebtedness was enumerated, the debt due St. Louis County being described as follows: "$700,000, at seven per cent. per annum, due the County of St. Louis for bonds maturing in 1885, for which there is no lien on the road." That the volume in which this financial statement was published also contains a copy of the act of January seventh, 1865, authorizing the County of St. Louis to issue the bonds here in controversy, and also a copy of the order of the County Court of St. Louis County, of January eighteenth, 1865, ordering the issue of said bonds, both of which are hereinbefore set out.

Twentieth. That by a resolution of the County Court, of March twenty-fifth, 1867, the presiding justice was ordered to "cast the vote of the County for directors of Pacific Railroad for those gentlemen who are opposed to the sale of the road, unless the interest of the County of St. Louis is protected by the terms of sale."

Act of March 31 1868, to sell road and foreclose State's lien

Twenty-first. That on the thirty-first day of March, 1868, the Legislature of the State of Missouri passed an act entitled "An Act for the sale of the Pacific Railroad, and to foreclose the State's lien thereon, and to amend the charter thereof." Which act, after providing for a sale of the Pacific Railroad in pursuance of the Act of February twenty-second, 1851, contained the following further provisions:

Section 5. Company may purchase on what terms.

"Section 5. If the Pacific Railroad Company shall, at any time within ninety days after the first day of April, 1868, pay into the treasury of the State the sum of three hundred and fifty thousand dollars, in the bonds of this State, or in money,

then, and in that event, the Governor shall not advertise said road for sale; and if the said company shall, within ninety days thereafter, pay into the State treasury an additional sum equal to five millions of dollars in all (the same being either in cash or Missouri State bonds), the Governor shall, upon the production of the receipts of the State treasurer for said amounts, execute and deliver to the said Pacific Railroad Company a deed of release for all claims, title, and interest which the State of Missouri has in and to the said Pacific Railroad, its property and appurtenances; and the said Pacific Railroad Company shall, from and after the delivery of said deed, be fully discharged from all claims or debts due to the State, and all liability growing out of the issue of the bonds of the State to aid in the construction of said road, and no sale shall, in that event, take place under this act. * * *

Section 6. In case of sale, St. Louis County protected.

"Section 6. In case of a sale of said road under the provisions of sections one, two, three and four of this act, the State of Missouri shall assume the payment of principal and interest due on seven hundred thousand dollars in bonds issued by the County of St. Louis as a loan to the Pacific Railroad Company, under the Act of January 7, 1865, and also the floating debt of said company existing at the time of the passage of this act, not to exceed the amount of six hundred and fifty thousand dollars.

Section 10.

Bidders to assume payment of bonds of St. Louis County.

"Section 10. All bids and proposals for the purchase of said road shall assume: First, the payment of principal and interest, due and to become due, on the one million five hundred thousand dollars first-mortgage bonds, issued under the Act of February 10, 1864; second, the principal and interest due on the seven hundred thousand dollars bonds, issued by the County of St. Louis to the Pacific Railroad Company, under the Act of January 7, 1865; third, the floating debt of said Pacific Railroad Company, existing at the time of the passage of this act, not to exceed the amount of six hundred and fifty thousand dollars."

State's lien purchased by Pacific Railroad and released.

Twenty-second. That said railroad was not sold as provided for in sections one, two, three and four of said acts, but that within the time specified in the fifth section of said act, the Pacific Railroad paid into the treasury of the State the amounts

therein specified, and that the Governor of the State thereupon delivered to the Pacific Railroad a release of the State's lien as provided by said section.

The "First Mortgage," its nature and purposes.

Twenty-third. That in order to enable it to accomplish a release of the State's lien under the provisions of section 5 of said act, and to retire the "Dresden bonds," the Pacific Railroad, on the 15th day of July, 1868, executed the so-called First Mortgage to Uriel A. Murdock, James Punnett and Luther C. Clark, trustees, to secure bonds to the amount of $7,000,000, maturing twenty years from August first, 1868, said bonds being in the denomination of $1,000 each, and bearing interest at the rate of six per cent. per annum, payable semi-annually in gold coin, upon the presentation of coupons attached to said bonds. This mortgage conveyed the entire line of the Pacific Railroad, extending from the depot at Fourteenth street, in the City of St. Louis to Kansas City, together with all the appurtenances and franchises of the railroad. The mortgage recites that the State of Missouri is the "holder of the first mortgage upon said railroad and appurtenances," subject to the Dresden mortgage for $1,500,000, and declares that the mortgage is made in order to retire the Dresden mortgage, and to purchase the claim of the State of Missouri under provision of an Act of March 31st, 1868, entitled "An Act for the sale of the Pacific Railroad, and to foreclose the State lien thereon, and to amend the charter thereof;" and the recitals in the mortgage further declare that the State of Missouri "is now the encumbrancer of the said railroad in the same manner as if it were the holder of the first mortgage upon said railroad and its appurtenances, except, however, that the State of Missouri, by Act of February 10th, 1864, authorized the issue by said railroad of $1,500,000, the bonds issued therefor to take precedence of the State lien, and be a first lien upon that portion of said railroad and its appurtenances extending from Dresden to Kansas City, and releases to that extent the first lien of said State of Missouri upon said portion of said railroad, but retained a second lien thereon."

The "Second Mortgage."

Twenty-fourth. That on the first day of July, 1871, the Pacific Railroad executed its so-called second mortgage to Edwin D. Morgan and Joseph Seligman, trustees and respondents herein,

to secure the payment of $3,000,000, represented by bonds of $1,000 each, bearing interest at the rate of seven per cent. per annum, payable semi-annually in currency, the bonds maturing twenty years after July first, 1871. This mortgage purported to be a second lien on the property and franchises of the Pacific Railroad.

The "Real Estate Mortgage."

Twenty-fifth. On the nineteenth day of April, 1872, as will appear from the admitted facts in the pleadings in the principal case, the Pacific Railroad executed a mortgage, called the "real estate mortgage," upon certain real estate in the city of St. Louis, which was asserted to be a first lien thereon to secure the payment of $800,000 in bonds maturing twenty years after April nineteenth, 1872.

Lease by Atlantic & Pacific Railroad.

Twenty-sixth. That by deed of lease dated Jan. twenty-ninth, 1872, the Pacific Railroad leased all its property for a term of nine hundred and ninety-nine years, to the Atlantic & Pacific Railroad Company. As a part consideration for the use of the leased property, the latter company agreed to pay the interest accruing from time to time on the various bonds of the Pacific Railroad, and also upon "certain bonds of the County of St. Louis, which were by said County loaned to the said Pacific Railroad, and which it undertook and agreed to pay, * * * all of which said bonds, except the St. Louis County bonds, are secured by mortgages." The lien of St. Louis County is not spoken of otherwise than in the language which I have quoted.

Monthly installments of interest paid.

Twenty-seventh. During the continuance of this lease, up to May first, 1875, the County of St. Louis received the monthly installments of interest accruing from time to time from the Atlantic and Pacific Railroad, receipting for the same as received from said Company as the lessee of and agent for the Pacific Railroad.

Case of Murdock vs. Woodson.

Twenty-eighth. That on July first, 1873, Uriel A. Murdock and Luther C. Clark, the trustees in the aforesaid "First Mortgage," filed a bill of complaint in the Circuit Court of the United States for the Western District of Missouri, to enjoin the Governor of the State from selling the property of the railroad under a lien, which was claimed by the State still to subsist in its behalf. The nature and purpose of this case are disclosed in

the case of Murdock vs. Woodson, 2 Dillon, C. C. 188, and in the same case on appeal to the United States Supreme Court, 22 Wallace, 351. In the bill of complaint it was averred as one of the equitable, if not legal grounds for sustaining the release which had been made by the State of its lien, under the provisions of the Act of March thirtieth, 1868, that, if the road had been sold under the State's lien, the County of St. Louis and other creditors would have been foreclosed; but that the release by the State to the Company left the stock of the city and county, and the tax-payers of the county, amounting in the aggregate to $2,278,000, intact, and left the liability remaining on the proper party to pay the floating debt of the company and the bonds issued by St. Louis County. The said bill of complaint also contained the following recitation:

Case of Murdock vs. Woodson. Allegations of bill.

"They [the complainants] say that the road was finally put in running order, through to the western boundary of the State, in the year 1866; but the Dresden bonds, together with the loan of the county credit, as aforesaid, proved insufficient to pay for such extension, and for the repairs and equipments rendered necessary by the circumstances hereinbefore stated, and at the time of such completion of the road there remained due by the company (which was chiefly held by citizens of Missouri, for labor and materials) a large floating debt, which, in equity and good conscience, together with the loan by St. Louis County, possessed claims *for payment not inferior to those possessed by the State under its statutory mortgage.*"

"Carondelet Branch Mortgage."

Twenty-ninth. That, on October first, 1873, as will appear from the admitted facts in the pleadings in the principal case, the Pacific Railroad executed its so-called "Carondelet branch mortgage," on its branch road extending the distance of thirteen miles, from Kirkwood to Carondelet, and called the Carondelet branch, to secure $500,000 in bonds maturing in twenty years from date, and purporting to be a first lien on the said Carondelet branch and all its structures and appurtenances.

"Third Mortgage."

Thirtieth. That, on July tenth, 1875, the Pacific Railroad executed its so-called "third mortgage" on its railroad property, appurtenances and franchises, to secure the payment of $4,000,000, represented in bonds of $1,000 each, bearing inter-

est at the rate of seven per cent. per annum, payable annually, said bonds maturing on May first, 1895.

What mortgage bonds negotiated.

Thirty-first. That it appears, from the pleadings in the principal case, that all the bonds secured by the first mortgage, the second mortgage, the real estate mortgage and the Carondelet branch mortgage, have been negotiated, and also that, on November eleventh, 1875, the date of the filing of George E. Ketchum's bill of complaint in the principal case, $2,300,000 of the third mortgage bonds had been issued and actually negotiated, and that the remainder were in the hands of the trustees to be exchanged for "income bonds," which had previously been issued by the company.

Mortgages duly recorded.

The nature of the mortgages heretofore referred to will be found described in the bill of complaint of George E. Ketchum, in the present case. The pleadings in the case show that all the mortgages heretofore referred to and described in the bill of complaint were recorded in the proper offices. It is further averred in the answer of respondents, and not denied in the reply of the intervenor thereto, that the first mortgage, second mortgage and third mortgage, heretofore referred to, were each and all duly recorded in each county in which the respondents had property, as required by law.

Bonds bought and sold under belief that St Louis County had no lien.

Thirty-second. That Francis A. Fogg, William H. Coffin, Darius R. Mangam and Andrew V. Stout, all residents of the State and city of New York, dealt in the bonds of the Pacific Railroad, secured by the mortgages above named, with the belief that the claim of the county of St. Louis here in controversy was an unsecured claim, or, at least, such a claim as would be in law postponed to the said mortgages. They seem to have derived their information from statements of parties representing the railroad company, from general reports and the general understanding among men dealing in these securities. Hudson E. Bridge, Joseph Brown and Poor's Railway Manual were mentioned by different witnesses as the sources from which they derived their information.

Default in payment of interest; institution of proceedings by St. Louis County.

Thirty-third. That, on October 18th, 1875, H. Reichtein, the county treasurer, reported to the County Court of St. Louis County that the Pacific Railroad had failed to pay interest on its bonds for four and one-half months, amounting to $18,000.

The Court thereupon ordered and instructed the county counselor to institute proceedings immediately to recover the money. On October 21st, 1875, the County Court of St. Louis County adopted the following resolution:

Institution of proceeding by St. Louis County.

"STATE OF MISSOURI, }
County of St. Louis. } *ss.*

"IN THE COUNTY COURT OF ST. LOUIS COUNTY.

"*OCTOBER TERM*, 1875.

"THURSDAY, October 21st, 1875.

"Justice Finney offers the following, which the Court adopts:

Resolution of Justice Finney.

"WHEREAS, The affairs of the Missouri Pacific Railroad are in an unsatisfactory financial condition, and

"WHEREAS, Said railroad company is now indebted to the county of St. Louis in the sum of seven hundred thousand dollars ($700,000) loaned to said company without security in the year 1865, together with a considerable sum of unpaid interest thereon, and

"WHEREAS, There is good reason to believe that, if immediate and strenuous efforts are not made, the county of St. Louis will lose a large sum of money; it is therefore

"*Ordered*, That a committee of three be appointed to confer with the county counselor, and to direct and cause to be instituted such proceedings and suits as shall be found necessary to protect the interests of the county in the premises.

"In pursuance of the foregoing order the Court appoint Justices Farrar, Finney, and Presiding Justice Shultz as the committee designated in said order."

Additional Attorneys employed.

On October twenty-eighth, 1875, the committee appointed under the last-mentioned resolution, were authorized by the County Court to employ such additional attorneys to assist the County Counselor in prosecuting the claim of St. Louis County as they should deem advisable; and on the same day, October twenty-eighth, 1875, the County of St. Louis filed a petition in bankruptcy in the United States District Court, for the Eastern

Petition in bankruptcy filed.

Alleged ground of bankruptcy.

District of Missouri, against the Pacific Railroad. The alleged ground of bankruptcy was, that the company had, while insolvent, executed the "third mortgage" in order to give a preference to certain pretended creditors, and "to hinder and delay its creditors and defraud the petitioner." The petitioner averred that its demand was provable under the Act of Congress concerning bankrupts; that it constituted one-fourth in number of the creditors of the company, and that the aggregate amount of its debt, provable under said Act of Congress, as described in its petition, amounted to at least one-third of the unsecured debts provable against the company under said Act of Congress. The nature of the county's demand against the company is described in the petition as follows, to wit: "By authority of the State of Missouri this petitioner did, on the first day of February, A. D. 1865, loan, execute, issue and deliver to said Pacific Railroad, bonds of this petitioner to the amount and value of $700,000 principal, payable twenty years after date, with interest at the rate of seven per cent. per annum, payable semi-annually, upon the express consideration and condition, duly accepted by said respondent, that it, said respondent, should provide for the payment of said principal sum at maturity, and that it, said respondent, in order to provide funds for the payment of said interest, should, every month after said bonds were issued, pay to this petitioner, to-wit, into petitioner's treasury, out of the earnings of said respondent, four thousand dollars; but that said respondent has failed, and although thereto by this petitioner often requested, has refused and still fails and refuses to pay said monthly amount due and payable for the months of June, July, August and September of this year, 1875, to-wit: Upon the first days respectively of the months of July, August, September and October of this year; and have wholly failed to make provision for the payment of said principal sum." The above petition was verified by the oath of H. Reichtein, as treasurer, "and herein agent" of the County of St. Louis; and further verified by the oath of Chauncey F. Shultz, as Presiding Justice of the St. Louis County Court. Said Shultz represented himself in said affidavit as being the "agent herein of the petitioner" in the bankruptcy proceedings. The Pacific Railroad filed an answer to the above described petition in bankruptcy, on November

Verification of petition.

Action on said petition.

eighth, 1875, and while denying that it was liable to be declared a bankrupt, made no denial that the county was an unsecured creditor for both its principal and interest in manner and form as averred in its petition. On May tenth, 1876, the petition to have the Pacific Railroad adjudged a bankrupt was referred by the court to the Register in Bankruptcy to ascertain whether the petitioning creditor represented a sufficient amount in number and value of the creditors of the debtor to sustain the petition under the provisions of the Act of Congress concerning bankruptcy. On May tenth, 1876, the petition was dismissed by the attorney of the county. On April third, 1876, this court made its decree in this cause releasing the Pacific Railroad of the lease which had been made to the Atlantic and Pacific Railroad Company heretofore spoken of, and appointing separate receivers of the Pacific Railroad. In said decree the said receivers were directed to pay to the solicitor of St. Louis County the sum of $41,000, being the amount unpaid to the county for interest on its loan up to April first, 1876. The evidence discloses the fact to be that the order above named for the payment of the $41,000 was the result of an arrangement between the representatives of the county and the representatives of the parties concerned in the foreclosure suit, and was the inducement to, if not the exacted consideration for the subsequent dismissal of the bankruptcy proceedings.

Determination of lease.

Order to pa $41,000.

On November sixteenth, 1875, the County of St. Louis filed in this case a petition, verified by the oath of the Presiding Justice of the County Court, and subscribed by its solicitors, in which it represented that it was a creditor of the Pacific Railroad in the sum of $720,000, and claimed the right to defend the suit in the protection of its interest.

Thirty-fourth. That on the sixth day of June, 1876, a decree was entered in the principal case of George E. Ketchum *et al.* vs. The Pacific Railroad *et al.*, by which the third mortgage upon the Pacific Railroad, the terms of which are hereinbefore recited, was foreclosed, and in pursuance of which all the property embraced in said mortgage was, on the sixth day of September, 1876, sold by Seymour D. Thompson, Esq., Master in Chancery; that on the twenty-fourth day of October, 1876, the said Master, under and by virtue of the said decree of foreclosure,

Sale of Pacifi Railroad t foreclose " Mortgage "

and of a decree dated on the said twenty-fourth day of October, conveyed by deed all the property covered by said third mortgage to James Baker, Esq., the purchaser thereof at said sale; that in said deed the provisions in said decree of foreclosure relating to the claim of St. Louis County here in controversy, that said county should not be prejudiced in any claim it might have by reason of the sale, was recited.

Property acquired by Pacific Railroad subsequent to loan of St Louis County.

Thirty-fifth. That since May, 1865, the Pacific Railroad has purchased property to the amount of $2,600,000; of which sum $280,000 was paid for real estate, and the remainder was paid for rolling stock for the company, all of which property was covered by the third mortgage, and has been conveyed by the deed above mentioned made to James Baker; that the southwest branch, so-called, was disposed of by the Pacific Railroad about March first, 1866; that the so-called Carondelet branch was built either in or since the year 1872.

Property not included in "Third Mortgage."

Thirty-sixth. That the receivers appointed in the principal suit have had control of a considerable property not included in the third mortgage, namely leased railroad lines and leased rolling stock; that during the period of the receivership the receivers have expended about $700,000 more than they have received from the earnings of the road. This deficit has been paid by the purchasers under the foreclosure sale made by this Court. That the receivers have not any funds in their possession belonging to the Pacific Railroad.

Participation of County as stockholder in business of Pacific Railroad.

Thirty-seventh. It does not appear that the County Court of St. Louis County, while it was a stockholder in the Pacific Railroad, actively participated in the business proceedings of the Company, or was represented in its affairs. On March third, 1864, the County Court instructed its presiding justice to attend a meeting of stockholders of the Pacific Railroad and cast the vote of St. Louis County stock in favor of accepting the provisions of an Act of the General Assembly of the State of Missouri, entitled "An Act for the extension and completion of the Pacific Railroad to the Western boundary of the State at Kansas City, and the North Missouri Railroad to the Iowa State line; to complete the Southwest Branch of the Pacific Railroad, and to reduce the State indebtedness." Approved February tenth, 1864.

Voting County's stock.

On March twenty-eighth, 1864, the County Court instructed its presiding justice to cast the vote of St. Louis County stock at the election that day to be held for directors of the Pacific Railroad. On March twenty-sixth, 1865, the County Court ordered the presiding justice to cast the vote of the county stock in the Pacific Railroad for certain persons for directors at an election to be that day held. On March twenty-seventh, 1866, the County Court requested its presiding justice to cast the vote of the county's stock at an election to be that day held for certain persons referred to in the order for directors of the Pacific Railroad. On March twenty-fifth, 1867, the County Court ordered the presiding justice to cast the vote of the county for directors of the Pacific Railroad "for those gentlemen who are opposed to the sale of the road unless the interest of the County of St. Louis is protected by the terms of sale." On March twenty-sixth, 1867, the County Court appointed one of its justices to act on the part of the county as a member of a committee to examine into the financial and material condition of the Pacific Railroad, in accordance with the request previously made, namely, on March twenty-fifth, 1867, at a meeting of the stockholders of the Pacific Railroad. On March thirtieth, 1868, the County Court ordered its presiding justice to cast the vote of the county's stock for certain persons designated in this resolution as directors of the Pacific Railroad at the election that day held.

Earnings during receivership.

Thirty-eighth. The earnings of the Pacific Railroad have, during the time that it was in the hands of the receivers, and at present, averaged about $300,000 per month.

Respectfully submitted this 5th day of April, A. D. 1877.

SEYMOUR D. THOMPSON.
Master in Chancery.

The case was submitted on the pleadings and the facts as found in the Master's report; and on April 25, 1877, the Court, per Dillon, J., delivered an opinion (p. 89) to the effect, that the question whether the county acquired a lien, and if so, whether it would take precedence of the subsequent mortgages or be liable to be defeated by a sale under a decree foreclosing

such mortgages, were close and difficult ones, and so gave a decree in favor of the county that the question might be speedily decided in this Court.

The decree was as follows (p. 81):

"This day come the said parties, by their solicitors, the said intervenor, by Messrs. Frank J. Bowman and Henry A. Clover, and the respondents, by Messrs. Cline, Jamison & Day, and this cause having been set down for hearing on the finding of facts as reported by the Master, and no exceptions being taken to said report, this cause is submitted to the court upon the facts so found and the arguments and briefs of counsel; on consideration thereof and being fully advised in the premises, it is ordered, adjudged and decreed that the county of St. Louis is entitled to an equitable lien or charge upon the earnings of the said Pacific Railroad to whomsoever the same may be transferred or conveyed, prior and paramount to any mortgage or other lien thereon; that the earnings of said Pacific Railroad be and the same are hereby charged with a lien in the sum of four thousand dollars per month, payable monthly from the first day of April, 1876, and the further sum of one thousand dollars, payable in each month of December, to meet the interest of seven hundred thousand dollars loaned by said county of St. Louis to the Pacific Railroad on the 18th day of January, 1865, shall be fully paid off by the Pacific Railroad; the said equitable charge is hereby decreed to exist and be enforceable on said earnings of said railroad property and franchises against the funds in the hands of the receivers herein and the purchaser under the mortgage sale heretofore ordered.

"It is further ordered that the costs herein to be taxed be paid out of the fund in the registry of this Court to the credit of this cause, including a Master's fee to Seymour D. Thompson of one thousand dollars.

"And now the said respondents, by their solicitors, pray the Court to grant them an appeal from the decree herein to the Supreme Court of the United States, which said appeal is allowed as herein prayed upon, the said respondents giving an appeal bond in the sum of fifty thousand dollars, to be approved by the Court, and that upon the filing and approval of said bond a

supersedeas be awarded, staying further proceedings on the enforcement of said decree."

From the decree the complainant in the principal suit and the trustees of all the mortgages have appealed to this Court.

ASSIGNMENT OF ERRORS.

The appellants for assignment of errors allege:

First. That the Circuit Court misconceived and misconstrued the intention and purpose of the Act of January 7, 1865, under the authority of which the loan was made by St. Louis County.

Second. The said Court further misconceived the intention of those who were parties to the making of said loan, as shown by their conferences, declarations and acts before, at the time of, and subsequent to the making of said loan.

Third. The intervening petition was without equity and the facts as found by the Master do not justify the relief sought for in the intervening petition or the decree made by the Court, and so, said intervening petition should have been dismissed.

Fourth. The said Court erred in decreeing that the county of St. Louis had any lien or claim upon the property or earnings of the Pacific Railroad, especially as against the mortgagees and purchaser of the property, who had a superior title thereto, which title was also acquired without notice of any lien claimed to exist in favor of the county.

MELVILLE C. DAY,

Of Counsel for Appellants.

ARGUMENT.

I.

THE ACT OF THE LEGISLATURE, UNDER THE AUTHORITY OF WHICH THE LOAN WAS MADE BY ST. LOUIS COUNTY, CANNOT BE CONSTRUED AS GIVING ANY LIEN ON EITHER THE PROPERTY OR THE EARNINGS OF THE PACIFIC RAILROAD.

The Act of the Legislature of the State of Missouri, under authority of which the loan was made, approved January 7, 1865, was entitled "An Act authorizing the County of St. Louis to issue bonds," and provided as follows:

"Sec. 1. The County of St. Louis is hereby authorized to issue seven hundred county bonds of the denomination of one thousand dollars each, having twenty years to run, and bearing interest at the rate of seven per cent. per annum, payable semi-annually, the principal and interest payable in the City of New York, and loan said bonds to the Pacific Railroad Company for the completion of said road; said bonds to be issued *under such conditions as may be agreed upon* between said County Court and the Board of Directors of the Pacific Railroad Company, such conditions to be binding on the parties, but shall not impair or affect the validity of the bonds after they are issued.

"Sec. 2. The Fund Commissioner of the Pacific Railroad, or such person as may at any time hereafter have the custody of the *funds* of said railroad *company*, shall, every month after said bonds are issued, pay into the county treasury of St. Louis County, out of the earnings of said Pacific Railroad, four thousand dollars, and one thousand dollars additional in each month of December, *to meet the interest* on the said seven hundred bonds; said payments to continue until the said bonds are paid off by the Pacific Railroad."

The first section of the above act was evidently intended to serve no further purpose than to give the *authority* to the county to issue the bonds and loan them to the company under such conditions as the County Court and the Directors of the company might agree upon.

the Dresden bonds. 2d. To the extension and equipment of the road from its then terminus at Dresden, to Kansas City. 3d. After the completion of the road, to apply any surplus over the accruing interest on the Dresden bonds, to the purchase or payment of the bonds themselves. 4th. To pay the interest, as the same should become due under any bonds of the company which might be issued in exchange for State bonds, as provided for in the sixth section. 5th. Not to exceed six per cent. interest on the preferred stock authorized by the act; and 6th, To employ the surplus, if any, to the purchase of the outstanding State bonds, with interest coupons thereon at the best market rates.

The act of February 10, 1864, was duly accepted by the company at a stockholders' meeting, at which the county voted its 5,000 shares of stock in favor of the acceptance. (p. 80.)

The reference we have made to the act discloses the nature and scope of the office of the fund commissioner. By it the State assumed no control over the management or operation of the road. The company still retained the control, possession and ownership of its railroad, property and franchises. The whole matter was simply a conventional arrangement entered into between the company and the State, its principal creditor, for the furtherance and protection of their mutual financial interests. Under that arrangement certain rights were guaranteed in favor of third parties, which, when once accrued, no acts of the State or the company could ever constitutionally impair. The State was acting solely as a mortgage creditor of the company, as it did in all the transactions concerning its loans made to the Pacific Railroad, and in which it necessarily divested itself of its sovereign character and took that of a private citizen.

Pennsylvania vs. Wheeling Bridge Co., 13 How. 559, 560.
Murdock vs. Dickson, 2 Dillon, 188.

And the fund commissioner was not acting in any political capacity but simply as the agreed special agent of the State and the Pacific Railroad.

State vs. McKay, 43 Mo., 599.

It is made apparent, in view of the provisions of the act of February 10, 1864, that at the time St. Louis County was authorized to make a loan to the Pacific Railroad, the company was utterly powerless to pay the interest on the proposed loan, so long as the fund commissioner should retain the possession of all its money and revenues. And the office of the fund commissioner was under the terms of the act, liable to continue for a period of time reaching beyond the maturity of the 20-year bonds, proposed to be issued by the county. In that dilemma, it became necessary to provide some *method* and *means* for the payment of the interest *during the time* the fund commissioner (or "such other person," by whatever name he should be called, who should succeed to his duties,) should have the custody and possession of all the *funds* of the company. That object could be effected *in only one way*, and that by an authorization and direction jointly given by the State and the company to the fund commissioner and his successor in office, to pay from the funds in his hands the semi-annual interest on the county bonds, as it should accrue from time to time, as long as the company should be deprived of the possession and control of all its earnings and revenues. Such authorization was given by the second section of the act of January 7th, 1865, in clear and explicit language; and it is difficult to conceive of any form of words by which the supposed purpose could have been more naturally or distinctly expressed.

On the other hand if the Legislature intended to give the County of St. Louis a *lien* of any kind on either the property or earnings of the Pacific Railroad, then the vagueness and obscurity in which that intention found expression is quite incomprehensible; and particularly so, in view of the very explicit language which it had used in other acts for the purpose of creating and preserving the liens of the state on the property and income of the company; or in view of the concise and guarded language which had been used when the State yielded or released its lien to any extent, or for any purposes on any portion of the company's property. No intimation is given in the act, which authorized the loan by the county, of any intended or fixed *preference* in favor of the county over others, who were then, or who might thereafter, be interested in, or have claims upon the same fund out of which the interest on the county bonds, was to

be paid. The act makes no suggestion of any *hypothecation, pledge, lien* or *mortgage* of the railroad, its appurtenances, earnings or franchises.

The act authorized and directed the fund commissioner to pay certain sums of money every month into the treasury of the county out of the funds in his hands; and so far, it was a full warrant to him for making the payments; at least, it was so, in so far as such payment would not prejudice the rights of parties who already had a vested interest in the funds in his hands by virtue of the provisions of the Act of February 10, 1864, and the authority was one which the State could undoubtedly have revoked at any time in the exercise of its sovereign authority over the affairs of the county: and which was done, as we claim, when the office of fund commissioner was abolished in 1868. (1 Dillon on Municipal Corp., § 35.)

An examination of the two acts now under consideration, will lead, we think, to the inevitable conclusion that the word "earnings" in the second section of the act authorizing the loan, was used simply to designate *that portion of the fund* entrusted to the fund commissioner which was not derived from the sale of the Dresden mortgage bonds, and otherwise than that, had no distinctive reference to the *origin* of the money that he was authorized to pay the county. It is to be noticed again, in this connection, that the fund commissioner was entrusted by the Act of February 10, 1864, with two classes of revenue, from which he was instructed to make payments, as specified in the act; the one being the proceeds of the sale of the Dresden mortgage bonds, and the other, the earnings of the road. And, as the proceeds of the sale of these Dresden bonds had been set apart for the specific and sole purpose of completing the extension of the road from Dresden to Kansas City, the use of the word "earnings" in the Act of January 7, 1865, simply operated to prevent any diversion of the proceeds of the Dresden bonds from the purpose to which they had already been separately

and specifically devoted. This view of the case is clearly confirmed, when it is observed that the act required the payments of interest to the county to be made by the fund commissioner "or such person as may at any time hereafter have the custody of the *funds* (not earnings) of said railroad *company*"; thus showing that the Legislature did not consider that it was making any distinctive or permanent appropriation in favor of the county out of the *earnings of the property* of the company.

Still further, it is to be noticed that the Act of February 10, 1864, directed the commissioner to make certain payments out of the earnings of the road; and the making of these payments was just as mandatory upon him as the direction to pay St. Louis County out of the same earnings. If, therefore, the Act of January 7, 1865, created a lien in favor of St. Louis County upon either the property or earnings of the Pacific Railroad, then the former act must have operated to create a series of just the same nature of liens, though superior to that of the county by reason of the priority of their creation. The result would be that a variety of permanent liens would thus have been created paramount to that of the State itself; though it is evident that the State intended to preserve its own first mortgage, subject only to the Dresden mortgage, in favor of which it made a specific concession.

If the intention of the Legislature had been to create a lien or mortgage in favor of the county on either the property or earnings of the company, it seems extraordinary that the *interest alone* should have been provided for, and the *principal* of the loan left entirely unsecured. Such an arrangement would be anomalous in an ordinary business transaction; and the language of a contract or a statute ought to be clearly expressed to warrant the conclusion that such an intention existed. And we can see no reason, from anything appearing in this case, why, if any mortgage or permanent security of any kind was intended to be given, it should not have applied to the payment of both principal and interest alike. If, on the other hand, the second section of the act be treated as a *means of enabling* the interest to be paid *during such time as the company should be deprived of the*

control of its own revenues, then the purpose of the Legislature is both obvious and sensible. It was agreed that the Commissioner should pay its interest to the county as long as he had the custody of the company's funds, which he was likely to have until the lien of the State should be paid or refunded; after that, in the language of the legal opinion given by the County Counselor before the loan was made, "the ultimate dependence for the payment of principal and interest lies in the responsibility of the company, present and future, in its ability to pay. If it is able it can be compelled to; otherwise, of course, not."

The opinion seems to have been entertained by the Circuit Court (p. 88) that the following words in the second section of the act of January 7, 1865, viz.: "Such person as may at any time hereafter have the custody of the funds of said railroad company," was intended to anticipate the repeal of the office of fund commissioner, and so related to a time when the company should regain the custody and control of its own funds. Aside from the reasons that have already been given there are others that seem to render that position untenable.

In the first place, there was no necessity or propriety in the Legislature defining the rights of the county on its loan, after the company should regain the control of its revenues. The county and the company had the power and were left free to make any arrangements they might deem proper covering that contingency: and that it was contemplated they would do so, is apparent from the clause of the act which authorized "said bonds to be issued *under such conditions as may be agreed* upon between said County Court and the Board of Directors of the Pacific Railroad Company."

Again, it is hardly appropriate to speak of any particular *person* as having the custody of the funds of a corporation, unless it be some one having special powers and duties of a kindred nature to those which were intrusted to the fund commissioner. If it had been intended to provide that whenever the company should regain the control of its funds, the earnings of the company or of its property should be pledged or mortgaged for the

payment of the interest on the bonds, such intention could certainly have been easily and explicitly expressed. If, on the other hand, the words "fund commissioner" and "such other person" are construed as being *in pari materia*, then, the intention of the Legislature, as assumed by us, is clearly and naturally indicated.

As already shown, the office or trust devolved upon the fund commissioner was *liable* to continue until the Dresden bonds should be paid, and also until the State's bonds should either be paid or exchanged for the first mortgage bonds of the company as provided for in the act; and so the trust was liable to continue for an indefinite period of time. During that time the name of the person performing the duties of the office might be changed, or a different depositary selected for the custody of the company's funds, with a view still of protecting the State in its large claim against the company: and so the act provided, very properly, that the interest on the county bonds should be paid by the fund commissioner or by any person succeeding him in his trust, acting as the mutual fiscal agent of the State and company. The provisions of the act, as to the payment of the interest, was intended to *co-exist* with the peculiar status of the financial affairs of the State and the company, which *necessitated* its passage; and was, we contend, no longer operative when the lien of the State become paid, and the control of its revenues was remitted back to the company.

That the act of January 7, 1865, was not intended to give the county any lien on the property or earnings of the company, is further made evident by the difficulty which would arise (in view of the facts existing at the time the act was passed), in determining the relative status of such a lien. The act directs the interest to be paid out of the earnings in the custody of the commissioner, but fails to state whether out of the *gross* or the *net* earnings. It hardly seems probable that the Legislature intended that the payment of the interest of the county should have a fixed preference over the payment of the operating expenses of the road, which, under the act of February 10, 1864, were first to be paid out of the gross earnings;

and it is not to be presumed that any preferred claim was attempted to be given the county on the net earnings of the company, which could only be done by the State in violation of good faith to the holders of the Dresden mortgage bonds, in whose favor the fund commissioner had been directed, at the time that mortgage was authorized, to pay both the interest and principal of the bonds out of the net earnings.

If, however, it is claimed by the intervenor that the intention of the act was to postpone the payment of the interest to the county in favor of the operating expenses of the road and the claims of the holders of the Dresden bonds, but that the claim of the county was to be a preference or lien superior to that of the State; our answer is that the act neither in terms or by implication warrants any such an assumption.

If the provision as to the payments to be made to St. Louis County, had for its purpose, the pushing aside or postponement of any one or more of the specific payments provided for in the previous act creating the fund commissioner, then it would certainly have defined, as it did not do, the exact status of the claim of the county in reference to the classified order of payments provided for in the act of February 10, 1864.

As it stands, the act treated the loan to be made by the county as an *ordinary liability* of the company. The fund commissioner was instructed to pay *generally*, out of funds in his custody, not arising from the sale of the Dresden bonds, the interest on the proposed loans, just as the company would have done if it had been in possession of its own revenues. In that view there is no disturbance of the provisions of the act of 1864, and no awkwardness in applying the provisions of the second section of the act of 1865 to the condition of affairs at that time existing. It is also incredible that the Legislature could have understood that it was deferring or releasing any portion of the State's lien in favor of the county, especially, as it was legislating upon a subject matter which in no way appertained to the *title* of the company's property.

The lien of the State had been created in explicit language, and it ought not to be *presumed* that its lien was constructively released or displaced; particularly, in view of the careful and

guarded language which the Legislature at other times used when yielding its lien for any purpose; as for instance, in the case where it released its lien *to a specified extent* in favor of the Dresden mortgage.

But we further claim that the county of St. Louis, so far from having any lien on the property or earnings of the company, when in the hands of the company or of a purchaser of the road, never, in fact, had any fixed or reliable security for the payment of its interest, even while the fund commissioner had the custody of the earnings and revenues of the company; a position which, though not material in the present controversy, is of importance as elucidating the utter groundlessness of the intervenor's present claim.

The payments provided for in the Act of February 10, 1864, were directory and imperative upon the fund commissioner, as well as those provided in the act relating to the loan by St. Louis County. Suppose that the commissioner had declined to pay any installment of interest due the county, what redress could it have had?

The county would have averred that it had a warrant or requisition payable out of the earnings in his custody. The commissioner could have replied: "but here are other warrants previously authorized to be drawn on the same fund and which I am directed to pay in a specified order; and all the funds I have, have been used or are needed to pay them." It seems to us that the answer would have been complete, and that the county would have been powerless to have enforced its claim. If so, the idea that the county of St. Louis ever had a so-called equitable lien on anything, was and is wholly illusory.

II.

THE ACT OF JANUARY 7, 1865, WHEN CONSTRUED IN THE LIGHT OF OTHER LEGISLATION OF THE GENERAL ASSEMBLY, DISCLOSES NO INTENTION OF CREATING ANY LIEN.

In construing a statute, in a case of any doubt and uncertainty as to the legislative intent, other acts either prior or subsequent, if *in pari materia*, may be referred to, in order to discover the intent of the Legislature in the use of particular terms.

Prather vs. Railroad, 52 Ind. 16, 32.

At the time the act of Jan. 7, 1865, was passed, it is to be presumed that the Legislature, if it intended to give a lien, and, particularly one in derogation of the one the State already held upon the property of the company, would have used language somewhat similar to that by which it had theretofore created and preserved its own mortgage lien on the property of the company. But a bare inspection of such previous legislation will show that the Legislature had, in every instance, used apt and precise terms when creating a lien in favor of the State, or in releasing any portion thereof; and the language so used was not employed in framing the Act of January 7, 1865.

By an act amending the charter of the Pacific Railroad, approved March 1, 1851 (Laws of 1851, p. 268), the company was authorized to borrow money for completing its road, "subject to the prior lien of the State."

By an act approved February 22, 1851 (Laws of 1851, p. 269), the credit of the State was authorized, and it was provided (sec. 4) that the loan, when accepted should "become and be, according to all intents and purposes, a mortgage of the road of the company, and every part and section thereof, to the people of the State for securing the principal and interest of the loan; and the Governor was authorized (sec. 11), on the default of the payment of either interest or principal of the bonds loaned, or any part thereof, to sell the road and its appurtenances at public auction.

By an act approved December 25, 1852 (Laws of 1853, p. 10), the Legislature authorized a loan by the State to the company for the building of the Southwest Branch "upon the like proof, terms, conditions and liabilities" as prescribed in the act of February 22, 1851.

By an act approved February 10, 1855 (Laws of 1855, p. 170), a further loan of the public credit to the Pacific Railroad and other companies, was authorized, conditional (sec. 2) that the people of the State, for the securing the principal and interest of the sums loaned, should have a mortgage on the road of the company, and every part and section thereof, and its appurtenances, in like manner as provided for in securing the payment of the principal and interest of the sums previously loaned, "and all the provisions of law now in force for securing such mortgage on the roads of the company shall be applicable to the bonds issued under this act."

So the act of December 12, 1855 (Laws of 1855, p. 484), the act of March 3, 1857 (Laws of 1857, p. 85), the act of November 19, 1857 (Laws of Adjourned Session, 1857, p. 59), and the act of March 5, 1859 (Laws of 1859, p. 63), all relate to the loan of the public credit by the State to the Pacific Railroad; and in every instance the Legislature stipulated in express and explicit language that the State should have a first lien or mortgage on the property of the company to secure its loans.

The act of February 10, 1864, under which the fund commissioner was appointed, provided for the issue of the Dresden bonds to the amount of $1,500,000 and authorized the company to secure the same by a mortgage on a portion of its road: "The State of Missouri, for this object, and to this amount and extent only, hereby relinquishes her first lien and mortgage and right of forfeiture upon said road west of Dresden, retaining, however, a second lien and mortgage, to become forthwith the first lien and mortgage in every respect, and as fully as now held by the State, upon the payment in full of the principal and interest of the bonds authorized by this act."

The legislation, after the loan was made by the county, also shows that it was not considered by the Legislature that the loan made by the county was in any way secured.

By the act of March 31, 1868, (Laws of 1868, p. 114,) under the provisions of sections 1, 2, 3 and 4, the Governor was directed (on the failure of the company to pay certain sums for the release of the State's lien, as provided for in section 5) to sell the Pacific Railroad and its appurtenances and all the property belonging thereto. And in section 6 it was provided that, in case of such sale, "the State of Missouri shall assume the payment of the principal and interest due on seven hundred thousand dollars in bonds issued by the County of St. Louis, as a loan to the Pacific Railroad Company under the act of January 7, 1865, and also the floating debt of the company existing at the time of the passage of this act, not to exceed six hundred and fifty thousand dollars."

It will be seen that, in case the road should be sold to a third party, no provision was made in reference to the holders of the Dresden mortgage bonds, which were still outstanding. And no such provision was necessary, as the purchaser would have taken a title subject to the Dresden mortgage, as he would also subject to the lien of St. Louis County, if the county had any lien superior to that of the State, under which it was proposed to sell the road. But the Legislature evidently considered the loan of the county, both principal and interest, as falling within the same category as the floating indebtedness of the company, and so provided that the State in the event of a sale to a third party should assume the payment of both alike, for neither would have constituted any claim against the purchaser, or upon the property acquired by him.

III.

THE OFFICIAL ACTS AND PROCEEDINGS OF THE COUNTY OF ST. LOUIS, PRIOR TO THE MAKING OF THE LOAN, SHOW THAT IT NEITHER REQUIRED OR PRETENDED TO RECEIVE ANY SECURITY FOR THE LOAN IT MADE TO THE PACIFIC RAILROAD.

It is an accepted rule of construction that, "in cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation, by the parties themselves, is entitled to great if not controlling influence.

Chicago vs. Sheldon, 9 Wallace, 50, 54.

The first official action of the County Court respecting the loan was the receiving and taking under advisement, on December 23, 1864, of a petition presented by Wm. M. McPherson, Hudson E. Bridge and Adolphus Meier, in behalf of the company, asking the Court to issue $700,000 in county bonds, to aid in the completion of the railroad.

The petition (p. 62) contained the presentation of facts which induced the subsequent action of the county in making the loan, and so its declarations are important to be considered in connection with the matter now under consideration. The petition states that, "at a late meeting of the Board of Directors of the Pacific Railroad, the undersigned were appointed a committee to confer with your honorable body in relation to the present condition and prospects of the Pacific Railroad; and to ask the aid of the county in completing that great work, so important to our State, *and of special interest to the city and county of St. Louis.*" The petition then proceeds to give a detailed statement of the destruction of the company's property made during the invasion of the State by the rebels, under Price, in the previous September. After giving the value of the property destroyed, the petitioners estimated the cost of again opening up the road

and putting it in operation at the sum of $700,000. The petition then proceeds as follows:

"This sum we have lost as the result of the invasion. This amount we want the county to provide by issuing to the company the bonds of the county (under authority to be given by the Legislature), bearing seven per cent. interest, the same to be a loan to complete the road, the company to refund to the county the principal and interest as the same mature. We make this application under the belief that the great value of a completed road to the city and county of St. Louis *would justify the expenditure even if it should never be returned in money by the company.* We ask it because, for the reasons above stated, we must raise that much money or let the work stop where it is, and our people lose all the benefits to result from a completed road.

"We ask this of the *county* because the city and county of St. Louis, in their corporate capacities, *own nearly one-half of the stock of the company*, and, therefore, *every citizen* is interested in the completion of the road, as a *means of enhancing the value of the stock.*

"Although we are Directors of the road, sent before you to make known the wants of the company, yet our interest as tax-payers is much greater than any interest we hold individually in the road, and we could not feel justified in asking this aid from the county if we did not believe that the *best interests of every tax-payer in the county were to be promoted* by the early completion of the road. We are not before you seeking to promote private and selfish ends, but we claim to come as the representatives of a great public enterprise, of such magnitude as to *interest, in common, every tax-payer in the county.*

"We want the loan of seven hundred thousand dollars, and we have shown for what purpose it is wanted. We are aware that a less sum has been spoken of; but a less sum will not complete the road. If, as we assume, a common interest requires the completion of the road, there is no use in driving hard bargains *with ourselves*, or delay the completion of the work by blind economy. * * * If completed, we believe that the earnings of the road will soon furnish all the equipments required for the increased business; pay off the $1,500,000 mortgage; provide

for the payment of the county bonds now asked for; and, in six or seven years, commence paying on the bonds issued by the State for our benefit. *But should the financial success of the enterprise not equal our expectations, the importance of the road as a great artery of trade and commerce will fully justify the expenditure asked for.* All of which is respectfully submitted," etc.

The mere reading of the foregoing petition can not fail to convince the mind that the representatives of the Pacific Railroad, in their communication to the county court, not only made no suggestion as to giving any security for the proposed loan, but that it was expected that the loan would be made, if made at all, in reliance on the ability of the company to ultimately pay its obligations. The county and city of St. Louis and their taxpayers were chiefly interested in the success of the railroad, not only as the owners of the capital stock of the company to the amount of $2,287,000 (p. 61), but because of the collateral advantages they would receive from the completion and operation of the road. If the company had been able, or had intended, to give any security for the desired loan, it would have, undoubtedly, been offered in the communication then made.

On December 29, 1864, six days after the communication had been received by the Court and taken under advisement, it was taken up by the County Court for consideration; whereupon Mr. Justice Fisse presented the following resolution, viz.:

"WHEREAS, The Directors of the Pacific Railroad Company have submitted to the Court their memorial setting forth the condition of the company, as well as the injury done it by the recent rebel raid into our State, by the destruction of so large a portion of its property; and praying the Court to issue, under authority to be obtained, $700,000 St. Louis County bonds, to be loaned to the said company in aid of completing the road to Kansas City; the committee, in their *verbal explanations, promising that the company would be prepared to pay all interest accruing, as well as the bonds when matured.* And after a mature and deliberate consideration of the question therein set forth, and *appreciating* the *necessity* of the early completion of the road, as also the *benefit to accrue to St. Louis County thereby*, it is ordered by the Court that they will not be adverse to issue St. Louis County bonds to the amount of $700,000 in aid of com-

of the road to the county and city as stockholders, and to the tax-payers of the county, fully justified the making of the loan, relying for its payment upon the responsibility of the company.

No further official action of the county court respecting the loan appears until after the passage of the act of January 7, 1865, the passage of which act was presumptively prompted by the action of the county court already alluded to.

The proceedings of the county court, subsequent to the passage of the act and prior to the making of the loan, do not offer any support to the theory that the court either received, or intended to receive any security by way of mortgage or lien for its loan.

The intervenor has produced and read in evidence a legal opinion of Geo. E. Leighton, Esq. (p. 66), dated January 10, 1865, and purporting to have been filed on the day of its date, in the clerk's office of the county court, and is addressed to Mr. George R. Taylor, President of the Pacific Railroad. The opinion gives Mr. Leighton's construction of the second section of the act of 1865, and purports to consider the rights of parties only in relation to the office of fund commissioner. The purport of that opinion is, as we understand it, that Mr. Leighton thought that the act anticipated, or pre-supposed, that an agreement would be made to the effect that the money for the payment of interest on the bonds should be furnished the county out of the earnings of the company; that when the agreement should be made the act would so far be an appropriation of the funds while in the hands of the commissioner that the payments could be enforced by mandamus, the commissioner being a public officer, acting in a ministerial capacity; and no reference is made to the status of affairs in the event that office should cease to exist.

There is no evidence in the case (p. 67) other than the mere fact of its being found among the papers of the county court, that the opinion was ever used to influence their action.

But it does appear (p. 67) that the county court called for the opinion of its official legal adviser in reference to the effect

of the act of January 7, 1865, upon the rights of the county in case it made the loan, which opinion was given in writing January 14, 1865; and we quote it here for two reasons: *First*, because, as it was before the county court prior to the making of the loan, its construction of the legal effect of the act was presumably confided in and acted upon by the members of the court; and *second*, because the opinion contains the carefully considered views of an able lawyer respecting some of the precise questions now under consideration in this case. That opinion was as follows (p. 67):

"ST. LOUIS, 14 January, 1865.

"*Hon. Jno. H. Fisse:*

"DEAR SIR: Your note of this date, enclosing a copy of a certified copy of an act authorizing the County of St. Louis to issue bonds to the amount of seven hundred thousand dollars, and to loan the same to the Pacific Railroad, is before me.

"You therein desire my opinion upon several propositions as to the legal effect of the second section of the act, and if (whether) the payments therein fixed, are secured to the county beyond all contingencies until such times when the bonds themselves may be paid by the Pacific Railroad Company.

"The second section of the act is brief enough for me to here transcribe. It reads thus: (Here the second section of the act of January 7, 1865, is quoted). The first matter which strikes my mind is that no provision whatever is made for the payment of the bonds themselves, or as to how, or out of what funds they are to be paid, or what security is offered beyond the responsibility of the railroad for their payment when due.

"As to whether the payments of the interest are secured beyond all contingencies, I would say that by virtue of 'An act for the *extension* and *completion* of the Pacific Railroad to the western boundary of the State at Kansas City and the North Missouri Railroad to Iowa State line, to complete the southwest branch of the Pacific Railroad, and to reduce the State indebtedness,' approved February 10, 1864, the company is authorized to borrow one million five hundred thousand dollars on its bonds, having four, five and six years to run, in equal proportions; said bonds to be secured by a first mortgage of a part of

the main line of the road, the State relinquishing her first lien and mortgage and right of forfeiture upon that part of the road. All of the net profits of the road, it is provided, shall be applied to the extension and equipment thereof until completed, reserving, however, sufficient for the payment of the interest accruing semi-annually on the bonds which should be sold; and after the completion of the road any surplus over the accruing interest shall be applied to the purchase or payment of the bonds themselves.

"Further, out of the gross earnings of the road from all sources, and all other sources of revenue belonging to or connected with said railroad, the fund commissioner is to pay for the operating of the road; and of the net earnings of the road, after paying the expenses of his salary, he is to apply those earnings to the extension and equipment of the road, reserving, however, sufficient for the payment of the interest accruing semi-annually on the bonds authorized by the act which might or should be actually sold; and after the completion of the road any surplus over the accruing interest is to be applied to the purchase or payment of the bonds themselves; second, to the payment of the interest as the same shall become due and payable on the first mortgage bonds issued and exchanged as provided in section six of said act; and next, not to exceed six per centum dividend on the preferred stock, as provided in section eight of the act; and the surplus, if *any*, to the purchase of the outstanding bonds with interest coupons thereon, and at the least market rates.

"This comprises all the directions to the fund commissioner as to the disposition of all the money which shall come into his hands, except moneys arising from the sale of bonds authorized by the act, which moneys are to be by him applied to the construction and equipment of the road.

"Now on the 7th of January, 1865, the Legislature enacts a law requiring the fund commissioner, out of the *funds* of the company, to pay a sum of money to meet the interest on other bonds which are by the act authorized to be issued. And the question may be asked, under which enactment is the fund commissioner to proceed, to apply the moneys coming to his hands as directed by the act of 10th of February, 1864, or as directed by the act of 7th of January, 1865?

"The bondholders, under the act of 1864, have two securities for the repayment of their money; first, a mortgage upon a portion of the main line of the road, and, second, the net profits of the road.

"These securities are clearly given in the act, and the bondholders have undoubtedly a right to look to both securities. They may have loaned their money upon the faith of both securities. They probably did look to the mortgage for the payment of their indebtedness, and the net earnings of the road for the payment of the interest upon their indebtedness.

"Can the Legislature divert this fund, or any portion of this fund, to the securing of subsequent creditors who contract with a knowledge that the security which they accept has been already pledged to another and earlier creditor?

"That is the question.

"It strikes me very forcibly that there is a contract between the bondholders and the company, which contract is authorized and sanctioned by the Legislature, and which forbids that body from impairing the obligation of a contract by the passing of this act, with or without the will of the company.

"Wherefore, I conclude that the payments fixed in the second section of the act, upon the proper construction of which you have asked my opinion, are not secured to the county beyond all contingencies at all until the time when the same may be paid by the Pacific Railroad.

"You ask, further, what would be the effect upon the security, if the State, at any time after the year 1870 and prior to the time of the maturity of the bonds, should foreclose the first mortgage and sell the road to a new company? And you ask, further, would the second section of the act referred to be binding upon such new company, and if not, to whom could the county look for the payment of said bonds?

"To which I answer, if the State sells the road under a prior mortgage to a new company, the security given by the act will be lost; the purchaser, under the mortgage, would not be bound by the provisions of the Act of 1865, and the county could look to nobody in particular for the payment of the bonds, though

the State might, under the circumstances, feel an obligation to refund to the county in the case supposed.

"You ask, in conclusion, what steps will be necessary to make the act, if accepted by the Court, binding upon the Pacific Railroad?

"To which I can hardly make reply. The act, if acceptable to the County Court, is binding upon the Pacific Railroad; but how binding the obligation may be, is a different question. I suppose if the bonds are issued and loaned, the ultimate dependence for their payment, principal and interest, lies in the responsibility of the company, present and future—in its ability to pay; if it is able, it can be compelled to: otherwise, of course, not.

"I am, respectfully, your obedient servant,

"H. A. CLOVER."

Resolutions were passed by the County Court on January 18 and February 3, 1865, and by the Board of Directors of the company on January 19, 1865, all relating to the loan, and the same are set out in the intervening petition.

Considered together, these resolutions contain an acceptance by both the county and company of the provisions of the act of January 7, 1865, and imply a promise on the part of the company to pay the bonds at maturity. These resolutions, and the letter of the President of the company, seemed to anticipate that the President of the company should execute an agreement under its corporate seal, covenanting that the company would pay the bonds at maturity, "so that the same should constitute a legal indebtedness on the part of said Pacific Railroad to the County of St. Louis." This agreement seems never to have been made; but the bonds were all issued between February 20 and May 5, 1865, and there is no question that the company became liable to pay the principal and interest of the same as a part of its "legal indebtedness." On the faith of that obligation the loan was made, and the authorization to the fund commissioner was an expedient resorted to for the purpose of enabling the company to redeem its promises during the existence of the fund commissioner's office, and when that office ceased to exist, and the custody of its revenues reverted to the company. We claim that the provision itself was of no further avail.

IV.

SINCE THE MAKING OF THE LOAN, THE REPEATED ACTS AND OFFICIAL DECLARATIONS OF THE COUNTY AND THE COMPANY, MAKE IT MANIFEST, THAT, PRIOR TO THE FILING OF THE INTERVENING PETITION IN THIS CASE ON APRIL 20, 1876, BOTH PARTIES UNDERSTOOD THE LOAN TO BE SIMPLY AN ORDINARY, UNSECURED INDEBTEDNESS OF THE COUNTY TO THE COMPANY.

Under the doctrine of the decision in the case of *Chicago vs. Sheldon*, already referred to, we claim that these subsequent acts and declarations may be fairly considered in order to ascertain the practical interpretation the parties themselves have given to the law and the proceedings under which the loan was authorized and made.

The fact that the company promptly paid the interest on the loan, up to the date of its insolvency in 1875, proves nothing; for it was bound to pay it like any other legal indebtedness, as long as it was able to do so.

A printed financial report (p. 73) issued by the president and directors of the company, dated November 30, 1866, after describing the Dresden bonds as constituting a first mortgage on a portion of the road, and the claim of the State for $7,000,000 as being a first mortgage on the entire road subject to the Dresden mortgage, mentions the further indebtedness of "$700,000, at seven per cent. per annum, due the county of St. Louis for bonds maturing in 1885, *for which there is no lien on the road.*"

By a resolution of the County Court, of March 25, 1867 (p. 73), the presiding justice was ordered "to cast the vote of the county for directors of the Pacific Railroad for those gentlemen who are opposed to the sale of the road, *unless the interest of the county of St. Louis is protected by the terms of the sale.*"

We have already attempted to show that the act of March 31, 1868, authorizing the sale of the Pacific Railroad under the State's lien, proceeded on the assumption that the loan made by the county was an unsecured indebtedness.

On July 15, 1868 (p. 74), the Pacific Railroad executed its first mortgage to Murdock and Clark, trustees, and respondents herein, to secure bonds to the amount of $7,000,000. This mortgage was issued by authority of the Board of Directors of the company; and the county as a large stockholder, as appears in its recorded action of March 30, 1863 (pp. 80, 81), participated in the election of the Board of Directors for that year, as it had also done in the elections of previous years.

The first mortgage covers the franchises and the property of the company at that time existing, recites that the State of Missouri is the "holder of the *first mortgage upon said railroad and its appurtenances*," subject to the Dresden mortgage for $1,500,000, and declares that the mortgage is made in order to retire the Dresden mortgage and to purchase the claim of the State of Missouri under the provisions of the Act of March 31, 1868.

On July 1, 1871, the company executed its second mortgage, purporting to be a second lien on its property and franchises, to secure bonds in the amount of $3,000,000. The bonds secured by the first and second mortgages were all negotiated, and have been judicially recognized by one of the federal circuit courts, and by this Court, as respectively constituting first and second mortgage liens on the entire property and franchises of the Pacific Railroad.

Murdock vs. Woodson, 2 Dillon, 188.
Same case (on appeal), 22 Wallace, 374.

And yet, if the claim of the intervenor is recognized at all as a lien, such lien must necessarily be superior to these two mortgages, as well as all subsequent ones issued by the company. For it is not claimed, and cannot be claimed, that the county has any rights or equities against the holders of the "third mortgage;" bonds, or the purchaser of the property under that mortgage, which are not equally available against the first mortgage, which was given to pay the Dresden bonds and purchase the State's "first mortgage."

On April 19, 1872 (p. 75), the Pacific Railroad executed a mortgage, called the "real estate mortgage," upon certain real estate in the city of St. Louis, which was asserted and intended

to be a first lien thereon, to secure the payment of $800,000 in bonds maturing twenty years after said date.

By deed of lease dated June 29, 1872 (p. 75), the Pacific Railroad leased all its property, for a term of years, to the Atlantic and Pacific Railroad Company. As a part consideration for the use of the leased property, the latter company covenanted to pay the interest accruing from time to time on the various bonds of the Pacific Railroad, and upon "certain bonds of the county of St. Louis which were by said county loaned to the said Pacific Railroad, and which it undertook and agreed to pay, and all of which said bonds, *except the St. Louis County bonds, are secured by mortgages.*" So that it will be seen that that lease, so far from giving notice of the county's pretended lien, as averred in the intervening petition, contains a declaration exactly to the contrary.

On July 1st, 1873, Murdock and others, trustees in the first mortgage, filed a bill in the Circuit Court of the United States for the Western District of Missouri to restrain the Governor of the State from selling the property of the Pacific Railroad to pay a portion of the State's lien claim which was claimed by the State to be undischarged by the release which had been made by the State under the Act of March 31, 1868. In the bill of complaint it was averred, as one of the equitable, if not legal grounds for sustaining the validity of the release made by the State under the act, that if the road had been sold under the State's lien, *the county of St. Louis and other creditors would have been foreclosed;* but that the release by the State to the company left the stock belonging to the city and county and the tax-payers of the county, amounting in the aggregate to $2,287,000, intact, "and left the liability remaining on the proper party to pay the floating debt of the company and the bonds issued by St. Louis County."

On October 1, 1873 (p. 76), the Pacific Railroad executed its "Carondelet branch mortgage" on its branch road, extending a distance of thirteen miles, from Kirkwood to Carondelet, to secure $500,000 in bonds, maturing in twenty years from date. The Carondelet branch was acquired and built subsequent to the execution of all the previous mortgages (p. 80), and eight years after the making of the loan by St. Louis County; and the

"Carondelet branch mortgage" purported, and was intended to be a first lien on the branch and all its structures and appurtenances.

On July 10, 1875 (pp. 76, 77), the Pacific Railroad executed its "third mortgage" on all its franchises, railroad, property and appurtenances, to secure the payment of $4,000,000 in bonds, maturing in twenty years after their date, being the mortgage under which the foreclosure proceedings and the sale have been had in the principal case. This mortgage was made subject to the "first mortgage," the "second mortgage," the "real estate mortgage," and the "Carondelet branch mortgage," and purported to be the next lien on all the property of the company. And on November 11, 1875, the date of the filing of Geo. E. Ketchum's bill of complaint in this case, $2,300,000 of the third mortgage bonds had been issued and actually negotiated, and the remainder were in the hands of the trustees to be exchanged for "income bonds," which had previously been issued by the company. Though the *earnings* and *income* of the company were *pledged* in express terms and explicit language for the payment of the income bonds, yet they were regarded as inferior and precarious securities, liable to be made worthless by any sale under a prior or subsequent mortgage which should divest the company of its *title* to its property and railroad franchises.

On October 18, 1875 (p. 77), the county treasurer reported to the county court that the Pacific Railroad had failed to pay interest on the county bonds for four and a half months, amounting to $18,000; and thereupon the county counselor was instructed to institute immediate proceedings to recover the money.

On October 21, 1875, the county court adopted the following resolution (p. 78):

"WHEREAS, The affairs of the Missouri Pacific Railroad are in an unsatisfactory financial condition; and

"WHEREAS, Said railroad company is now indebted to the county of St. Louis in the sum of seven hundred thousand dollars, *loaned to said company without security*, in the year 1865, together with a considerable sum of unpaid interest thereon; and

"WHEREAS, There is good reason to believe that if immediate and strenuous efforts are not made the county of St. Louis will lose a large sum of money, it is therefore

"*Ordered*, that a committee of three be appointed to confer with the county counselor, and to direct and cause to be instituted such proceedings and suits as shall be found necessary to protect the interests of the county in the premises."

On October 28 the committee appointed under the above resolution were authorized by the county court (p. 78) to employ such additional attorneys to assist the county counselor in securing the claim of the county as they should deem advisable.

And, on the same day (p. 78), the county of St. Louis filed a petition in bankruptcy against the Pacific Railroad, in the United States District Court for the Eastern District of Missouri, based upon its loan made to the company. The alleged ground of bankruptcy was that the company had, while insolvent, executed the "third mortgage," in order to give a preference to certain creditors, and to hinder and delay its creditors and "defraud the petitioner." The petitioner averred that the county's demand was *provable* under the act of Congress concerning bankrupts; that it constituted one-fourth in number of the creditors of the company; and that the aggregate amount of its debt provable under said act of Congress, as described in the petition, *amounted to at least one-third of the unsecured debts provable against the company* under said act of Congress. The petition was verified (p. 79) by the oaths of the county treasurer and of the presiding justice of the county court, each asserting himself to be the "agent herein" of the petitioner.

On November 11, 1875, Geo. E. Ketchum, in behalf of the holders of the "Third Mortgage Bonds," filed his bill of complaint in this case, asking for the appointment of receivers and a foreclosure sale of the property covered by the third mortgage. In that bill of complaint the various mortgages issued by the company are described, and the order of their respective lien on the property, as heretofore described, is distinctly averred; and the bill avers, and the pleadings admit, that all the said mortgages were duly recorded in the proper offices.

The company filed an answer to the bankruptcy petition on November 8, 1875 (p. 77), and, while denying that it was liable to be declared a bankrupt, made no denial that the county was an unsecured creditor for both its principal and interest, in manner and form, as averred in its petition. On May 10, 1876, the petition for adjudication was referred by the District Court to the Register, to ascertain whether the petitioning creditor represented a sufficient amount in number and value of the creditors of the debtor to sustain the petition under the bankrupt act; and on May 10, 1876, over six months after it had been filed, the petition was dismissed by the attorney of the county. But on April 3, 1876, the court below made its order appointing separate receivers of the Pacific Railroad, and therein directed them to pay to the solicitor of St. Louis county the sum of $41,000, being the amount unpaid to the county for interest on its loan up to April 1, 1876.

The evidence discloses, that the order for the payment of the $41,000 was the result of an arrangement between the representatives of the county and of the parties concerned in the foreclosure suit, and was the inducement to, and consideration for, the subsequent dismissal of the bankruptcy proceedings (p. 79). To the extent then, of the $41,000 so received, the position of the county as an *unsecured creditor* seems to have been a valuable one.

On November 16, 1875 (p. 79), the county filed in this case a petition, verified by its presiding judge and subscribed by its solicitors, in which it represented that it was a creditor of the Pacific Railroad in the sum of $720,000, and claimed the right to defend this suit in the protection of its interests.

On April 20, 1876 (p. 36), the present intervening petition of St. Louis county was filed in this case, wherein it is claimed that the county has a lien for its loan superior to all the mortgages that exist on the property and franchises of the company. From December 23, 1864, the day upon which the committee from the company solicited the loan from the county, up to the date of the filing of that petition, comprising a period of over eleven years, we do not find that the company ever recognized

or that the county ever claimed any security upon the loan; and the official acts and authoritative declarations of both have been uniformly and repeatedly to the contrary.

Millions of dollars have been loaned to the company on the faith of the liens, as declared by the mortgages made by the company, and a portion, at least, of the mortgages were made while the county was a large stockholder in the company, and participated officially in its affairs by voting its stock at the annual election for directors.

The bonds secured by the mortgages have been bought and sold by parties who believed (p. 77) that the claim of the county was unsecured. Such a belief was certainly warranted by the official records and proceedings already referred to. And as a municipal corporation may estop itself like other parties to a contract (*County of Randolph* vs. *Post*, 3 Otto, 51), we submit that the county of St. Louis, even if it originally had an equitable lien, should now be considered to have waived the same, and be precluded from asserting a doubtful equitable lier in the face of its oft repeated official declarations that no such lien existed.

V.

THE DECREE RENDERED IN FAVOR OF THE COUNTY CANNOT BE SUSTAINED UNDER ANY VIEW THAT CAN BE TAKEN OF THIS CASE.

The decree in favor of the county was as follows: "It is ordered, adjudged and decreed, that the county of St. Louis is entitled to an equitable lien or charge upon the earnings of the said Pacific Railroad, to whomsoever the same may be transferred or conveyed, prior and paramount to any mortgage or other lien thereon; that the earnings of said Pacific Railroad be and the same are hereby charged with a lien in the sum of four thousand dollars per month, payable monthly, from the first day of April, 1876, and the further sum of one thousand dollars, payable in each month of December, to meet the interest of

seven hundred thousand dollars loaned by said county of St. Louis to the Pacific Railroad, on the 18th day of January, 1865, shall be fully paid off by the Pacific Railroad. The said equitable charge is hereby decreed to exist and be enforceable on said earnings of said railroad property and franchises against the funds in the hands of the receivers herein, and the purchasers under the mortgage sale heretofore ordered."

Looking to the language of this decree we find it is utterly impossible to discover to what the so-called equitable lien attaches.

It is in the first instance declared to be "upon the earnings of the said Pacific Railroad."

But the "Pacific Railroad" is the *corporate name of the company;* and so it would seem that the earnings of the *corporation, as such*, are contemplated without reference to any specific property from which its revenues may be derived.

But farther on, the decree declares that "the said equitable lien is hereby decreed to exist and be enforceable on said earnings of said railroad property and franchises, against the funds in the hands of the receivers herein, and the purchasers under the mortgage sale heretofore ordered."

Here there seems to be an intention to affix the lien to the earnings of railroad property; but the decree, as well as the intervening petition, give no intimation what specific railroad property is referred to.

Referring again to the act of January 7, 1865, we find that it is there provided that the "fund commissioner of the PACIFIC RAILROAD, or such person as may at any time hereafter have the custody of the funds of said railroad COMPANY, shall pay ——— out of the earnings of said PACIFIC RAILROAD, etc., said payments to continue until the said bonds are paid off by the PACIFIC RAILROAD."

It is apparent that the act by its terms has reference only to the Pacific Railroad *as a corporation*, and not to the property of that company.

It can hardly require argument to show that a pledge of the earnings of an individual or of a corporation is essentially quite

a different thing from a pledge of the earnings of certain specific property belonging to them. The one case comprehends the income of the pledger, and the sources from which it may be derived are entirely immaterial; the other covers simply the revenue from specific property, and while the pledger may himself become insolvent, or for any other reason may cease to have a revenue, still the property itself may continue to yield a revenue. If, then, the county of St. Louis acquired a lien upon the earnings of the corporation—the Pacific Railroad—it is evident that there was nothing to which that lien could attach at the time the intervening petition was filed, or the decree made, or at any subsequent period.

As regards the receivers, the admitted facts are, as disclosed by the Master's report (p. 80), that they had not any funds in their hands belonging to the Pacific Railroad, they having expended during their receivership $700,000 more than they had received from the earnings of the road; and it cannot of course be claimed that the purchaser, under the sale had in the foreclosure proceedings, has in its custody any funds belonging to the old company.

But suppose that we assume that the county has a lien, not upon the earnings of the company, but upon the earnings of the *property of the company*, the question then immediately arises, against the earnings of what property is this lien to be enforced?

This is a problem that remains totally unsolved, both in the intervening petition and in the decree.

A large portion of the property which belonged to the Pacific Railroad at the time the loan was made, consisted of rolling stock, which is declared by the charter of the Pacific Railroad, as well as by the constitution and laws of the State of Missouri, to be personal property. Subsequent to the time of the loan being made by the county, and up to May, 1865, the company had paid (p. 80) $2,320,000 for additional rolling stock.

Does the lien attach to such rolling stock or its earnings, and if so, to what portion? Is it simply to such as belonged to the company at the time the loan was made, or to that which was in the hands of the receivers at the time of the decree? Or to that which has since been acquired by the purchaser of the rail-

road, or which such purchaser may acquire at any indefinite period in the future? And if a third party has purchased from the company any of its rolling stock, such as an engine or a car, is it still chargeable with the lien of the county in the hands of such purchaser?

If, again, we treat the line of railroad as real estate, upon what portion of it does the lien attach?

Between the time of the making of the loan and the entering of the decree the company had paid (p. 80) $280,000 for additional real estate, and had also constructed its Carondelet branch, 13 miles long; and its Southwest branch, a valuable property, had also been disposed of.

If the lien attached only to the property that belonged to the company at the time the loan was made, then the Southwest branch should be made to contribute toward the payment of the lien, and the property since acquired should be relieved from any liability therefor.

But the intervenor may contend that its lien is of such a nature that it attaches to the earnings of any property at any time belonging to the Pacific Railroad, irrespective of the manner or time of its acquisition.

Such a proposition, it will be seen, concedes that the lien is not upon any specific property or its earnings, but upon the property belonging to the Pacific Railroad (Company); and in that view, now that the company has no ownership of any of the property described or in controversy in the principal case, what becomes of the so-called equitable lien?

If it be once admitted that a sale by the company of any particular piece of real estate or personal property would relieve it in the hands of the purchaser from being chargeable with the lien, then it must necessarily follow that a sale by the company of a larger portion or of all of its railroad and rolling stock would equally relieve the purchaser from being in any way chargeable to the county on account of its claim.

And as there is nothing in the Act of January 7, 1865, which refers in the remotest degree to subsequently acquired property, such property cannot, upon well established principles of

the law, be considered as covered by the provisions of the act. The propositions, here raised, are all important, both as regard this case and also as concerning the legal status of income bonds, which are frequently issued by railroad companies, and which are secured by the earnings of a company or by the earnings of specific property of the company, and sometimes by both. Such bonds, as we believe, have never thus far been regarded as creating a lien on the property of the company issuing them superior to the *title* of a subsequent mortgagee or purchaser of the *property itself.*

For the reasons stated, we contend that the decree is fatally vague and indefinite, and cannot consistently be sustained under any view that can be adopted as to the rights of the county.

VI.

THE HOLDERS OF THE VARIOUS MORTGAGE BONDS REPRESENTED BY THE RESPONDENTS HAD, AT THE TIME THE BONDS WERE NEGOTIATED, NO NOTICE OF THE EXISTENCE OF ANY LIEN IN FAVOR OF THE COUNTY.

All the mortgages made by the Pacific Railroad were duly recorded (p. 77) in each county in the State of Missouri where the property was situated as required by law. Unless, then, these mortgagees had notice of the lien of the county, they cannot be affected by it. It is claimed by the intervenor that the Acts of January 7, 1865, and of March 31, 1868, were public laws, and so affected the mortgagees with constructive notice of the lien, which, it is contended, was created by the former act.

But we contend that the Act of January 7, 1865, was purely a private act, and that it contains none of the elements necessary to constitute a public law. It is entitled "An act authorizing the county of St. Louis to issue bonds;" and so far as appears by the provisions of the act, the only parties interested in or affected by them are the county of St. Louis and the Pacific Railroad, and that, too, simply in respect to a private pecuniary transaction.

It has been decided that a statute which concerns only a particular county or a particular corporation is a private and not a public law.

Loper vs. Mayor, &c., 1 Mo. 682.
Dwarris on Statutes, p. 464.
Sedgwick on Construction of Stat. and Const. Law, p 25.
Seeling vs. City of Racine (per Mr. Justice Miller), 8 Am. Law Reg. 603.

"Private acts do not bind or conclude third parties or strangers; and they are not bound to take notice of a private act, though there be no general saving clause of their rights. This is a rule of ancient date, and has been steadily adhered to."

Beaty vs. *Knowle's Lessee*, 4 Pet. 167.
Sedgwick on Stat. and Const. Law, p. 27.
9 Bacon Abr. (Title Stat.) pp. 233 4.

Even when a clause is added to a private act declaring it to be a public statute, this is intended, simply to facilitate the proof thereof, and does not in any way charge third persons with notice of its provisions or of facts therein recited.

Dwarris on Statutes, p. 472.
Brett vs. *Beales*, 1 Moody & Melkin, 416, 425.

But, it may be urged by the respondent, that if its view of the case is adopted by the court, then the act of January 7, 1865, will be treated as affecting the interests of the State as a creditor of the company, and so should be construed as a public law. But it is to be observed that the act *purports to affect* only the county and the company in their respective relations of creditor and debtor; if the State was affected as to its lien on its revenues by the provisions of the act, such a result was purely *incidental*, and forms no part of its *expressed purpose*. But in any event, even if a portion of the act is to be construed as relating to the public revenues, still that does not make the portion of the act, which concerns solely private pecuniary interests, a public law so as to affect third parties with notice thereof.

A private act may contain clauses of a public nature, and then the act so far only as those clauses are concerned is to be

regarded as a public act; and so, a public act may contain clauses of a private nature, of which third parties are not chargeable with notice.

Dwarris on Statutes, pp. 465, 472.
Sedgwick on Const. and Stat. Law, p. 94.
2 Phillips on Ev. (Cowen & Hill's notes), * 341.

So it has been decided that a statute which concerns the public revenues is a public statute, but some clauses therein may, if they relate to private persons only, be private; for a statute may be public in one part and private in another.

9 Bacon's Abr. (Title Stat.), p. 232.

It follows then, that after the office of the fund commissioner became extinct there remained no effective provision in the act of January 7, 1865, that can be considered in any view that can be taken of that act, as relating to any public officer or public interest; and, when the mortgages were made, the provisions of the act concerned only the mutual interests of the county and the company.

But it is claimed that the recitals in the act of March 31, 1868, operated to give public notice of the provisions of the act of January 7, 1865.

By section 6 of that act it was declared that if the road should be sold to a third party as provided for, then "the State of Missouri shall assume the payment of the principal and interest due on seven hundred thousand dollars in bonds issued by the county of St. Louis as a loan to the Pacific Railroad Company under the act of January 7, 1865."

By section 10 it was declared that if the road should be purchased by the State the Governor might thereafter receive bids for the purchase thereof from the State; and that all bids thereof shall assume among other things, "the principal and interest due on the seven hundred thousand dollars bonds issued by the county of St. Louis to the Pacific Railroad Company, under the act of January 7, 1865."

Assuming that the act now being considered was a public law, inasmuch as it concerned the interests of the State; wherein can it be construed as giving any public notice of private clauses contained in the act of January 7, 1865?

The act itself, so far from showing that the county had any lien on the property of the company, assumes as we have already shown, that the claim of the county was unsecured, and stood in the same situation as the floating indebtedness of the company. The act of January 7, 1865, is referred to therein simply to *designate* the loan that was being provided for.

But this recital cannot aid the county in effecting parties with notice, for if it be accepted doctrine that there can be a private clause in the body of a public act, of which third parties and strangers need not take notice, then, it must necessarily follow that a mere reference to such public act in another public act, cannot serve to impart public notice of the private clauses contained in the laws so referred to.

It is to be further observed in answer to the suggestion made in their briefs by counsel for the county, that the mortgagees do not derive their title in any way through the act of March 31, 1868. That act simply operated to release a lien, and left the title of the property where it had been previously, in the ownership of the company. And, the lien having been released, it became then no part of the duty of a mortgagee or a purchaser to inquire how that lien had been discharged, in his investigation of the title to the property he proposed to acquire.

It is also suggested that the purchaser under the third mortgage had, at the time of the sale, notice of the fact that the county claimed a lien, as the intervening petition had then been filed in this case. But the purchaser at that sale is subrogated to the rights of the holder of the third mortgage bonds; and there can be no pretence that they, at the time the bonds were negotiated to them, had any notice that the county claimed a lien, other than the constructive notice, which we have claimed did not exist.

VII.

THERE IS NO RULE OF LAW TO BE FOUND IN ANY OF THE ADJUDGED CASES THAT WILL WARRANT THE ENFORCEMENT OF AN EQUITABLE LIEN AGAINST THE EARNINGS OR PROPERTY OF THE PACIFIC RAILROAD; AND MUCH LESS AGAINST SUCH PROPERTY OR ITS EARNINGS IN THE POSSESSION OF A MORTGAGEE OR PURCHASER OF THE PROPERTY.

Suppose that the company had, in explicit language, covenanted that it would appropriate and pay out of the funds coming into its own possession or that of its agents, sufficient to pay the interest on the county's loan, the county would still have no lien on such fund.

It will be seen that if the county has a lien, it must have existed, after the office of fund commissioner was abolished, against the fund in the company's possession or in the possession of its own agents or employees.

The question, then, is raised whether a covenant by a debtor to appropriate a fund *to be acquired* and coming into his *own possession* or that of *his agents* constitutes an equitable lien thereon.

The case of *Rogers vs. Hosack's Exrs.*, 18 Wendell, 344, bears directly on these points.

One Gracie covenanted with certain of his creditors, providing that, if after certain funds were applied to the payment of their debts there should be a deficiency, then such deficiency should be made up and paid out of any moneys that should be received by him, his executors, administrators or assigns from the French government, for and on account of certain claims which he held against it; and that such deficiency should be paid out of said moneys when and as soon as the same should be received by him, his executors or assigns. There was a deficiency; the claims were allowed by the French government, and Gracie having died, the certificate therefor was issued to Gracie's executor. The con-

troversy in the case was, whether the creditors, or the executor, in his representative capacity, was entitled to the money so received from the French government.

It was held that the fund belonged to the executor.

In deciding the case, Justice Cowen said: "It seems to me extremely plain that, had Gracie survived the French treaty (under which the money was paid) and received the money due upon these certificates, Rogers & Sons (the creditors who sued) might have sued him at law for not paying their share," and that this would have been their only remedy in that regard.

"Here is *no assignment, no mortgage or pledge*, no order or any other specific appropriation of the French funds; but a *mere covenant to pay them over on their being obtained by the covenantor.*" That such an agreement does not create any lien, either at law or in equity, several point blanc cases were cited on the argument. Indeed, among the cases cited to show that these articles of agreement may be made operative as an assignment, I have been unable to discover the least countenance for such a construction.

In *Malcolm vs. Scott*, 3 Hare, 45, 46, the Court said:

"Nothing, I conceive, can be more clear than that *instructions* communicated *by a principal to his own agent* to apply the property of the principal in payment of a particular creditor, do not *per se* give that creditor any lien upon the property in the hands of the agent. I think it equally clear, that the mere announcement by a principal, even to his creditor, that such an arrangement had been made by himself for the payment of the creditor's debt, would not alter the case or give the creditor a lien. It is clear that, notwithstanding such direction or communication, the property may remain under the dominion of the debtor."

In *Hoyt vs. Story*, 3 Barb. (S. C.), 262, 264, the Court said:

"In all these cases (of equitable assignment) it will be perceived that there is *something more than a mere agreement to pay out of the particular fund.* There is some appropriation of the

fund, either by giving an order upon it or by transferring it, in such a manner that the holder would be authorized to pay it to the creditor directly, without the further intervention of the debtor. This I understand to be the true distinction between the mere contract to pay out of certain funds and an appropriation of the fund, which courts of equity will uphold as an equitable assignment."

In *Bradley vs.* ———, Bridg. Ch. Cases, 194, (cited in *Rogers vs Hosack's Exr.*, 18 Wend. 345). Lord Hardwicke decided that a promise to pay a debt out of a particular fund did not create a specific lien; remarking that the consequences of a contrary doctrine "would be a great stagnation of commerce and repugnant to that course of circulation which the well-being of trade demanded."

In *Christmas vs. Russell*, 14 Wall. 69, there was a promise to pay a certain judgment out of the proceeds of a note held by the promissor. This Court there held that there was no equitable assignment, and said (p. 84):

"An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment; a covenant, in the most solemn form, has no greater effect. The phraseology employed is not material, provided the intent to transfer is manifested. Such an intent and its execution are indispensable. *The assignor must not retain any control over the fund*—any authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee."

Suppose, still further, that the company had expressly covenanted that the earnings and income of all its railroad and property should be bound and pledged for the payment of the interest on the county's loan, still that would constitute no lien on such earnings, the property itself being in the possession of a subsequent mortgagee or purchaser.

This proposition has virtually been passed upon, in cases where a debtor has given his creditor a power of attorney authorizing the creditor to sell specified property and apply the proceeds to the payment of the amount due him.

Webb vs. Walker, 7 Cush. 46, is a case where P., the purchaser of one-half of a brig, gave W., the seller, his notes for a certain amount of the purchase money, and also a bond reciting that the said amount was to run on bottomry on the half of the brig, and conditioned to pay the notes at maturity, and that on P's failure to pay the notes, W. might sell half the brig at public auction for the payment of the notes and expenses, accounting to P. for any surplus. And P., by the same instrument, appointed W. his attorney to convey said half to the purchaser at such sale.

It was held that this instrument did not create an equitable lien on the brig, nor declare a trust which could be enforced against a subsequent purchaser from P. with or without notice. The Court said (p. 50): "Where a party has conveyed *an interest in the thing itself*, with a power to sell and appropriate the proceeds, the grantee takes something more than a naked revocable power; but when only a power to sell is given without any interest in the *subject matter*, *except in the proceeds* arising from the sale, it is otherwise."

Of the instrument referred to, the Court said (p. 52):

"It is not a mortgage, because there were no words of absolute or conditional transfer, no delivery or record; nor an assignment, because no interest in the property to be sold was coupled with the power to sell; nor a pledge or hypothecation, because attended by no delivery or change of possession. It was no more a declaration of trust, binding on third parties, than would be constituted by an agreement of mortgage, pledge or hypothecation, without delivery and without change of possession. It might be good against the original party, if he for whose benefit it was made could get peaceable possession, but could not effect a subsequent purchaser or creditor."

In the case of *Hunt* vs. *Rousmanier*, 8 Wheat. 174, 204, the same doctrine is announced in a similar case, where it is said, "we hold it to be clear that the interest which can protect a power after the death of a person who creates it must be an *interest in the thing itself*. In other words, the *power must be engrafted on an estate in the thing*."

In *Anderson* vs. *State*, 23 Miss. 459, 475, it is declared that "the right of prior payment does not, of itself, constitute a lien. The distinction is an obvious one. A lien is said to be a qualified right, which in a given case may be exercised over the property of another. It attaches to the *subjects of property* and follows them in their transmission to others. Priority of payment is a preference in the appropriation of the *proceeds of the debtor's property*. Hence, if before it is attached, there is a bona fide transfer *of the property*, the right will be lost."

In *Banks* vs. *Booth*, 2 Bos. & Pul. (*) 219, 223, Lord Elden said: "There is a great difference between a demise of *tolls* and of *toll-houses*. The former gives a personal interest in respect of which an action for money had and received may be maintained; the latter gives an interest in land, which is within the statute of mortmain."

Perkins vs. *The Deptford Pier Company*, 13 Simons, 277, is where the Pier Company issued debentures by which they mortgaged their tolls to persons who had lent them money for the purposes of their undertaking. Two creditors of the company, who had no security on the tolls, recovered judgments against the company for the debts due them. Thereupon, the debenture creditors filed a bill against them and the company, alleging that they themselves had the first lien on the lands of the company, and that the judgment creditors, in collusion with the directors of the company, intended to take out elegits and take possession of the lands of the company, and they prayed for an injunction to restrain them from so doing and for a receiver of the tolls. There was also a controversy with one of the creditors respecting a mortgage held by him on the lands of the company. A demurrer to the bill for want of equity was sustained. The Chancellor said: "If the plaintiffs really meant to have a security on the *lands* of the company, they might have had it. But they file a bill because they have a lien on the *tolls*, and they say that there can not be any tolls if there is no land; and these persons who, first of all, bethought themselves of taking a mortgage on the land may, by taking the land, prevent the raising of the tolls. But, suppose that they do, they will only be using the powers which they lawfully may use. I

think, therefore, that no equity whatever arises to the plaintiffs in that respect, and that they have no other right to the lands in mortgage, or subject to the judgments, than that which is to be inferred from the circuitous way in which they have taken security by debentures on the tolls."

In *Garrett* vs. *May*, 19 Md. 177, a controversy existed between the holders of bonds, for the payment of which the Central Ohio Railroad had specifically pledged the *income* arising from its road and its appurtenances, and the holders of bonds secured by a subsequent mortgage of the *property* of the company. The court expressed the view that the holders of the income bonds had no right to complain of the making of the mortgage, though it seems to have been assumed in the case that the mortgage would constitute a superior title on the property of the company; for the reason, as given by the court, that the mortgage by the company of its railroad, was but increasing its ability to render its road available for the reception of income, thereby enabling it to meet the payment of the income bonds previously issued by the company.

And such undoubtedly is the true status of income bonds; their value may, according to circumstances, be increased or impaired by reason of mortgages placed upon the property out of which the income arises. If the avails of the mortgage are instrumental in putting the company upon a basis of prosperity, then the income account will be increased, and will so far inure to the benefit of the holders of income bonds. But if the company subsequently becomes bankrupt, and the mortgage of its property and franchise is foreclosed, then the security of the income bond is extinguished.

In 2 Story's Equity Jurisprudence, § 1249, it is declared to be "a general rule, that a covenant by a settler to convey and settle certain lands (not specifying any in particular) will not constitute a specific lien on his lands; and the covenantee will be deemed a creditor by specialty only."

If this doctrine be accepted, then certainly, much less can there be a lien on lands where there is simply a pledge of the

earnings of property or land, which lands and property, as in this case, are not specified or described.

The court below (p. 89), cited the case of *Legard* vs. *Hodges*, 3 Brown Ch. 531, 538, and same case, 4 Brown Ch. 421, as maintaining the doctrine "that where parties came to an agreement as to the produce of land, that the land itself will be affected by the agreement, and equity will specifically enforce the agreement against the parties who make it, and all persons with notice." The court below announced this doctrine with hesitation, and, while the doctrine expressed in the case of *Legard* vs. *Hodges*, is not in consonance with the cases we have already referred to, we do not believe that in any view they can be applied to the facts of the present case.

In that case, Hodges, in contemplation of marriage, agreed that £10,000 should be paid to trustees for certain purposes, and he covenanted, that in case the marriage took effect, he would set apart and appropriate, as a fund toward raising said sum, one third part of the clear yearly rents arising from his several estates in Berks and Oxford, and would yearly pay the same to the trustees, and that they should stand possessed of the said £10,000 in trust, to pay the dividends thereof for certain specified purposes. The marriage was duly solemnized, and, subsequently by another deed, Hodges turned over all his property to other trustees, to manage and collect the rents, and to apply the same in payment of their own costs, then to pay Hodges himself certain sums and apply the residue to the payment of certain debts of Hodges, the deed *reciting the previous deed of settlement.*

The case was reheard before the Lord Chancellor, who, in announcing his opinion, said (4 Brown's Ch. 421): "The defendants, Turner and Johnson (the trustees in the second deed), *are not purchasers*, there was no consideration. *They are not creditors;* there is a provision in the deed as to sums to be advanced, but not as to sums then due. Johnson and Turner are mere agents of Hodges. The covenant in the marriage settlement is recited in the deed. They are liable to Hodges creditors of any sort. I am of the opinion that Johnson and Turner

are to be considered as Hodges. Declare that Hodges must *specifically perform the contract*, and that Johnson and Turner under the terms of the deed must account with the plaintiffs" (the trustees in the first deed of settlement).

It will be observed that the instrument under consideration in the above case, was a marriage settlement, and as such, under well recognized rules, was entitled to be construed liberally, and beneficially to the issue of the marriage who were to participate in the settlement.

2 Story's Eq. Jur. § 983.

Also the one-third part of the rents arising from *specific estates* were set apart and appropriated for the payment of the sums provided for.

The chancellor likewise laid particular stress on the facts that the second deed recited the previous settlement, and that no rights of creditors or purchasers had intervened, and the implication from his language is, that if such rights had intervened, a different conclusion would have been reached.

The decree was simply one of specific performance against the covenantor himself, and so virtually involves no question of the nature or essentials of an equitable lien.

Hence we claim that the case of *Legard* vs. *Hodges* cannot be applied in any of its doctrines to the present case.

None of the cases cited in the brief of respondent's counsel (brief of Messrs. Clover and Bowman, pp. 1, 2, 3) *justify the proposition, by them contended for, that the county has an "equitable mortgage upon the tolls, income and revenue of the railroad."*

The case of *Legard vs. Hodges* has been already considered.

Power vs. Bailey, 1 Ball & Beat. (*) 49, is, where a married woman, in whom certain estates had been vested with power in her to dispose of the same by a deed *reciting the power, charged* these estates with the payment of an annuity to a young lady about to be married, and for whom she had promised to provide.

The Lord Chancellor said, "I do not think that this is the case of a rent charge, but it is the covenant of the wife *charging her separate estate.*"

Falkner vs. O'Brien, 2 Ball & Beat. (*) 223, is where a *particular piece of land* was expressly *charged* by covenant with the payment of a specified sum.

Fremoult vs. Dedire, 1 Peere Williams, 429, is where a party by marriage settlement had covenanted to *settle* certain *specified lands* upon his wife for life, and it was held that the marriage articles constituted a specific lien thereon.

Williams vs. Lucas, 2 Cox, Ch. Cases, 160, is where a party borrowed money and, by his note, "promised to pay the same on demand, and to give a security by mortgage of lands for the same when required." It was held that the debt was *not a charge on any particular lands.*

In *Hale vs. Elliott*, cited in 2 Sugden on Vendors (*) 106, where there was a covenant to settle £300 per annum, on land of that value, in three counties, and *no particular lands being named*, it was held that a *purchaser* of the land *with notice* was not bound to give effect to the covenant.

Finch vs. Earl of Winchelsea, 1 Peere Williams, 277, is where one *agreed*, for a valuable consideration, *to convey certain lands* to J. S., and afterwards confessed a judgment in favor of another party; and it was held that the agreement bound the land and defeated the lien of the judgment.

Shannon vs. Bradstreet, 1 Scho. & Lef. 63, is a case where a tenant for life, with leasing power, entered into articles of agreement to make a lease *pursuant to the power;* and the agreement was held to bind the remainder man.

In *Blake vs. Marnell*, 2 Ball & Beat. (*) 35, property was vested in trustees by a marriage settlement, which authorized Marnell, one of the beneficiaries, to raise or borrow any sum of money. Having become indebted, he granted to his creditor an annuity or yearly rent charge of £150 *charged* upon the *lands included in the settlement.* The rent charge was declared to be

a *due execution of the power* and an enforceable charge upon the lands.

Collyer vs. Fallon, 1 Turner & Russell, 459, is a case where a captain in the army deposited his commission with a creditor, authorizing him to sell the commission and repay the loan out of the proceeds of the sale. But the officer subsequently sold his commission through other agents, by consent of the Crown, which had first to be obtained before the sale could be made. It was held that, though the creditor could retain the commission for what it was worth, as a simple piece of parchment, he had no lien on the proceeds of the sale, even as against the debtor's assignee in bankruptcy.

In *Collins vs. Central Bank of Georgia*, 1 Kelley (Ga.), 435, the Monroe Railroad and Banking Company issued its bills, under a provision of its charter, which provided "that the railroad to be built by said company from Macon to Forsyth, together with all the revenues arising therefrom, and all the property, equipment and effects therewith connected, shall be pledged and bound for the redemption of the notes or bills issued by said company." It was held that the bill holders had a lien upon that portion of the railroad which was actually built by the company.

Whitewater Valley Canal Co. vs. Vallette, 21 How. 414, is where bonds were issued by a canal company, pledging the real and personal property of the company for the payment of the debt and interest, and containing other corresponding stipulations; and it was held that it would be treated by a court of equity as a mortgage, and be enforced according to the intention of the contracting parties.

The cases of *American Bridge Co. vs. Heidebach*, 94 U. S. 798; *Galveston Railroad Company vs. Cowdrey*, 11 Wall. 459, and *Gilman vs. Telegraph Co.*, 91 U. S. 603, are all where the *property itself*, as well as the income thereof, was mortgaged. And even in those cases it was held that the mortgagees, before *taking possession of the property*, had no claim, even after *default* by the debtor, to the income earned by the company, that would not be postponed in favor of the subsequently acquired lien of a judgment creditor of the company.

If any doctrines can be derived from those cases decided by this court that are applicable to this one, it is, that the right of possession to the earnings of property, follows and is appurtenant to the title of the property itself; and hence, that one party cannot have the title to, and exercise a possessory dominion over property, and another be allowed to claim or enforce an adverse title to its income or earnings. And such we believe to be the doctrine uniformly derivable from the authorities.

Peugh vs. Davis, 96 U. S. 332, simply decides that a deed of lands, absolute in form, when executed as a security for a loan of money will, in equity, be treated as a mortgage.

Pallan vs. Railroad Company, 5 Biss. 237, is where *a railroad and its income* were mortgaged; and so, of course, there was a common ownership of the property and its earnings.

Delaire vs. Keenan, 3 Dessau. 74, and *Miller vs. Railroad Co.*, 36 Vt. 452, are both cases where imperfect agreements, intended as mortgages, were held to be equitable mortgages.

In *Gale vs. Morris*, 29 N. J. Eq. 222, it was held that an equitable mortgage may arise from non-payment of purchase money, a deposit of title deeds, or an unsuccessful attempt to make a valid mortgage deed.

Such are the cases, that the counsel for the county have chosen to cite, after an apparent, laborious research of the authorities. And we submit, that none of them contain doctrines that are available to sustain any proposition that will justify the enforcement of a lien in favor of the county against the earnings of the property and franchises of the Pacific Railroad; both of which are now owned and in the possession of the purchaser under the foreclosure of the third mortgage.

MELVILLE C. DAY,
Of Counsel for the Appellants.

IN THE

SUPREME COURT

OF THE UNITED STATES.

October Term, 1879, No. 162.

GEORGE E. KETCHUM, *et al.*,
Appellants,

vs.

THE COUNTY OF ST. LOUIS, *Intervenor*, and the CITY OF ST. LOUIS *also intervening herein, under the order of this Court, of March* 4, 1879.

STATEMENT AND ARGUMENT ON BEHALF OF THE CITY OF ST. LOUIS.

LEVERETT BELL,
Of Counsel for the City of St. Louis.

ST. LOUIS:
CHANCY R. BARNS, PRINTER, 215 PINE STREET.
1879.

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STATEMENT AND ARGUMENT ON BEHALF OF THE CITY OF ST. LOUIS.

STATEMENT.

The Pacific Railroad of Missouri, for the purpose of securing its bonded indebtedness, executed three mortgages covering its property and franchises, and known as the first, second and third mortgages, bearing date respectively July 15, 1868, July 1, 1871 and July 10, 1875; and proceedings were had in the court below which resulted, June 6, 1876, in a decree of foreclosure and sale, under the third mortgage, of the property, premises and franchises of the company, subject to the prior mortgages and to a condition expressed in the decree, as follows:

It is further ordered, adjudged and decreed, that nothing in this decree contained shall be construed to prejudice, in any manner, the claim of the county of St. Louis to a lien on the property and franchises of the said Pacific Railroad, alleged by the said county to exist, as fully appears by the amended petition in this cause filed by the said county, for securing the payment of a certain debt

of the said Pacific Railroad to said county, for the sum of $700,000 and interest thereon, and alleged and claimed by the said county of St. Louis to be a prior lien therefor over all other incumbrances upon said property and franchises, the question of the existence and priority of said lien to be hereafter determined by this court, if not otherwise satisfactorily adjusted. (pp. 28, 29, printed record.)

The sale was made and duly reported to the court, and confirmed, October 6, 1876, by an order in which the rights of the county of St. Louis were preserved as follows:

Now, therefore, it is ordered, adjudged and decreed, that the sale be and the same is hereby confirmed, according to the conditions of the order of sale heretofore made by this court at its last term, and subject to the claim of the county of St. Louis to a prior lien thereon for $700,000 and interest thereon, as the same has been or may be established by this court, or by the Supreme Court of the United States in case of appeal. (Printed record, p. 30.)

In the meantime, and upon April 20, 1876, the county of St. Louis, by leave of court, had filed an amended intervening petition in the cause, setting forth substantially that, under and by virtue of an act of the General Assembly of the State of Missouri, entitled "an act authorizing the county of St. Louis to issue bonds," approved January 7, 1865, in words and figures as follows:—

SEC. 1. The county of St. Louis is hereby authorized to issue seven hundred county bonds, of the denomination of one thousand dollars each, having twenty years to run, and bearing interest at the rate of seven per cent. per annum, payable semi-annually, the principal and interest payable in the city of New York, and loan said bonds to the Pacific Railroad Company, for the completion of said road; said bonds to be issued under such conditions as may be agreed upon between said county court and the board of directors of the Pacific Railroad Company, such conditions to be binding on the parties, but shall not impair or affect the validity of the bonds after they are issued.

SEC. 2. The fund commissioner of the Pacific Railroad, or such person as may at any time hereafter have the custody of the funds

of said railroad company, shall, every month after said bonds are issued, pay into the county treasury of St. Louis county, out of the earnings of said Pacific Railroad, four thousand dollars, and one thousand dollars additional in each month of December, to meet the interest on the said seven hundred bonds; said payments to continue until the said bonds are paid off by the Pacific Railroad:

—it had issued and loaned to the Pacific Railroad seven hundred bonds of said county for $1,000 each, having twenty years to run and bearing interest at seven per cent., which bonds were sold by the company and the proceeds thereof applied to the construction of bridges, and to repairing the railroad and its depots.

That the monthly installments of interest under the act of January 7, 1865, were paid up to and including the month of May 1875, and no part of the unpaid interest to April 1, 1876, amounting to $41,000, had been discharged, and it was claimed and prayed that there be established in favor of the county of St. Louis an equitable and statutory lien for said sums of $41,000 and $700,000 upon the earnings of the Pacific Railroad prior to all other liens on said road, and that the same be preferred above all other charges and demands against the railroad. (Printed record, pp. 37 to 42 inclusive.)

The payment of the interest, $41,000, up to April 1, 1876, was subsequently made under an order of court of May 10, 1876. (Printed record p. 43.)

The intervening petition was demurred to by the opposing parties as containing no ground of action, and the demurrer was overruled (p. 45, printed record), and thereupon an answer was filed, and the facts were found and stated by a master, and there was a final decree April 25, 1877, in favor of the county of St. Louis, in words and figures as follows:

GEORGE E. KETCHUM, *et al*, COMPLAINANTS, *vs.* PACIFIC RAILROAD, *et al.*, DEFENDANTS.

In Re Intervening Petition of St. Louis County.

This day come the said parties by their solicitors, the said intervenor by Messrs. Frank J. Bowman and Henry A. Clover, and the respondents by Messrs. Cline, Jamison and Day; and this cause having been set down for hearing on the finding of facts as reported by the master, and no exceptions being taken to said report, this cause is submitted to the court upon the facts so found, and the arguments and the briefs of counsel; on consideration thereof, and being fully advised in the premises—

It is ordered, adjudged and decreed, that the county of St. Louis is entitled to an equitable lien or charge upon the earnings of the said Pacific Railroad, to whomsoever the same may be transferred or conveyed, prior and paramount to any mortgage or other lien thereon; that the earnings of said Pacific Railroad be and the same are hereby charged with a lien in the sum of four thousand dollars per month, payable monthly from the first day of April, 1876, and the further sum of one thousand dollars, payable in each month of December, to meet the interest of seven hundred bonds loaned by said county of St. Louis to the Pacific Railroad on the 18th day of January, 1865, shall be fully paid off by the Pacific Railroad; the said equitable charge is hereby decreed to exist and be enforceable on said earnings of said railroad property and franchises, against the funds in the hands of the receivers herein, and the purchaser under the mortgage sale heretofore ordered.

It is further ordered, that the costs herein to be taxed, be paid out of the fund in the registry of this court to the credit of this cause, including a master's fee to Seymour D. Thompson, of one thousand dollars.

And now the said respondents, by their solicitors, pray the court to grant them an appeal from the decree herein, to the Supreme Court of the United States, which said appeal is allowed as herein prayed, upon the said respondents giving an appeal bond in the sum of fifty thousand dollars, to be approved by the court, and that upon the filing and approval of said bond a supersedeas be awarded, staying further proceedings on the enforcement of said decree. (Printed record, pp. 81–82.)

The appeal was duly perfected May 4, 1877.

Afterwards, the city of St. Louis moved, in this court, to be substituted as intervening petitioner herein, in lieu

of the county of St. Louis, because certain governmental changes had taken place which were set forth in the motion, and thereupon the following order was entered:

George E. Ketchum, *et al.*, appellants, vs. The county of St. Louis, intervenor. The motion of the city of St. Louis, praying that it might be substituted in place of the said county of St. Louis, having been considered by the court, it is, upon consideration thereof, this 4th day of March, 1879, ordered that said city of St. Louis be, and it is hereby allowed to intervene in the said cause, for the purpose of protecting such interest as it may have therein, and for the purpose of being heard at the argument of the cause if it shall so elect.

ARGUMENT.

I. The right of the city of St. Louis to be substituted herein in lieu of the county of St. Louis, may properly first be considered. The solution of the question will not affect the appellants, and possesses, it is assumed, no interest to them. If there is any contest over it—and it is not seenhow there can be,—it is between the city of St. Louis and the county of St. Louis.

Great changes have taken place in the structure of the city and county of St. Louis since the amended intervening petition was filed below on behalf of the county, and it is by virtue of the provisions contained in the constitution and laws of Missouri, under which the modifications alluded to were made, that the money in question here is now asserted to be the property of the city of St. Louis. A reference to the provisions will, it is thought, demonstrate that the ownership of the fund, originally held by the county of St. Louis, has by operation of law been vested in the city of St. Louis.

The constitution of the State of Missouri, now in force, went into effect upon the 30th day of November, 1875, and sections 20, 21, 22, 23, 24 and 25 of article 9 thereof, provide as follows:

SEC. 20. The city of St. Louis may extend its limits so as to embrace the parks now without its boundaries, and other convenient and contiguous territory, and frame a charter for the government of the city thus enlarged upon the following conditions, that is to say: The council of the city and county court of the county of St. Louis, shall, at the request of the mayor of the city of St. Louis, meet in joint session and order an election, to be held as provided for general elections, by the qualified voters of the city and county, of a board of thirteen freeholders of such city or county, whose duty it shall be to propose a scheme for the enlargement and definition of the boundaries of the city, the reorganization of the government of the county, the adjustment of the relations between the city thus enlarged, and the residue of St. Louis county and the government of the city thus enlarged, by a charter in harmony with and subject to the Constitution and laws of Missouri, which shall, among other things, provide for a chief executive and two houses of legislation, one of which shall be elected by general ticket, which scheme and charter shall be signed in duplicate by said board or a majority of them, and one of them returned to the mayor of the city and the other to the presiding justice of the county court within ninety days after the election of such board. Within thirty days thereafter the city council and county court shall submit such scheme to the qualified voters of the whole county and such charter to the qualified voters of the city so enlarged, at an election to be held not less than twenty nor more than thirty days after the order therefor; and if a majority of such qualified voters, voting at such election, shall ratify such scheme and charter, then such scheme shall become the organic law of the county and city, and such charter the organic law of the city, and at the end of sixty days thereafter shall take the place of and supersede the charter of St. Louis, and all amendments thereof, and all special laws relating to St. Louis county inconsistent with such scheme.

SEC. 21. A copy of such scheme and charter, with a certificate thereto appended, signed by the mayor and authenticated by the seal of the county, setting forth the submission of such scheme and charter to the qualified voters of such county and city and its ratification, by them, shall be made in duplicate, one of which shall be deposited in the office of the Secretary of State, and the other, after being recorded in the office of the recorder of deeds of St. Louis county, shall be deposited among the archives of the city, and thereafter all courts shall take judicial notice thereof.

SEC. 22. The charter so ratified may be amended at intervals of not less than two years, by proposals therefor, submitted by the law-making authorities of the city to the qualified voters thereof at

a general or special election, held at least sixty days after the publication of such proposals, and accepted by at least three-fifths of the qualified voters voting thereat.

SEC. 23. Such charter and amendments shall always be in harmony with, and subject to the Constitution and laws of Missouri, except only, that provision may be made for the graduation of the rate of taxation for city purposes in the portions of the city which are added thereto by the proposed enlargement of its boundaries. In the adjustment of the relations between the city and county, the city shall take upon itself the entire park tax; and in consideration of the city becoming the proprietor of all the county buildings and property within its enlarged limits, it shall assume the whole of the existing county debt, and thereafter the city and county of St. Louis shall be independent of each other. The city shall be exempted from all county taxation. The judges of the county court shall be elected by the qualified voters outside of the city. The city, as enlarged, shall be entitled to the same representation in the General Assembly, collect the State revenue and perform all other functions in relation to the State, in the same manner as if it were a county as in this Constitution defined; and the residue of the county shall remain a legal county of the State of Missouri, under the name of the county of St. Louis. Until the next apportionment for senators and representatives in the General Assembly, the city shall have six senators and fifteen representatives, and the county one senator and two representatives, the same being the number of senators and representatives to which the county of St. Louis, as now organized, is entitled under sections eight and eleven of article IV of this Constitution.

SEC. 24. The county and city of St. Louis, as now existing, shall continue to constitute the Eighth Judicial Circuit, and the jurisdiction of all courts of record, except the county court, shall continue until otherwise provided by law.

SEC. 25. Notwithstanding the provisions of this article, the General Assembly shall have the same power over the city and county of St. Louis that it has over other cities and counties of this State.

Pursuant to the above constitutional provisions, a scheme for the separation of the city and county of St. Louis and the enlargement of the boundaries of the city and the adjustment of the relations between the city enlarged and the remainder of St. Louis county, and a charter for the government of the city of St. Louis as

enlarged, were framed by a board of freeholders, elected for the purpose, in the manner above specified, and were ratified by the vote of the people at an election held as required by law, upon August 22d, 1876; and the scheme and charter went into operation sixty days thereafter, on the 21st day of October, 1876, and since said day have been and are now operative upon the county of St. Louis and the city of St. Louis, and the county and city exist under the provisions of the same, they being the law of the land.

The scheme and charter are separate instruments, having distinct functions to perform, and sections 2, 9, 10, 11, 13, 20, 24, 32 and 34, of the scheme, are as follows:

SEC. 2. The city of St. Louis, as described in the preceding section, and the residue of St. Louis county, as said county is now constituted by law, are hereby declared to be distinct and separate municipalities, and all authority heretofore exercised by the county court of St. Louis county, or any officer of said county, is hereby forever abrogated and annulled, except for the purposes and in the cases as hereinafter provided.

SEC. 9. It shall be the duty of the present county court of St. Louis county to see that all buildings, moneys, and other property belonging to the county, which are placed under the control of the city under this scheme, shall be formally and properly transferred. Said court shall cause all records, books, papers, etc., now in the office of said court, to be turned over to the register, who shall duly schedule same, and report the same for inspection of the mayor. All employees and officers now in the service of the county in connection with public institutions or otherwise, under appointment of said court, and within the limits of the city of St. Louis, as herein established, shall continue in the discharge of their duties under the present rules and regulations until notified to the contrary by the mayor of the city, who shall have authority to retain or for untitness discharge such as he may deem necessary, until the municipal assembly can provide by ordinance for the government of such institutions and regulations of such service.

SEC. 10. All the public buildings, institutions, public parks, and property of every character and description heretofore owned and controlled by the county of St. Louis within the limits as extended, including the court-house, the county jail, the insane asylum

and the poor-house, are hereby transferred and made over to the city of St. Louis, and all the right, title and interest of the county of St. Louis in said property, and in all public roads and highways within the enlarged limits, are hereby vested in the city of St. Louis, and divested out of the county; and in consideration of the city becoming the proprietor of all the county buildings and property within its enlarged limits, the city hereby assumes the whole of the existing county debt, and the entire park tax; and the municipal assembly shall, as soon as practicable after the adoption of this scheme and charter, provide by ordinance for the management of the property and public institutions hereby placed under its charge.

SEC. 11. The municipal assembly shall, from time to time, make provision by ordinance for the payment of the county debt, and interest thereon, as the same matures, and in all respects said debt shall be considered a city debt, and shall be transferred to the books of the city, and embraced in all official statements of its funded liabilities.

SEC. 13. A board of finance is hereby created, to consist of the mayor and comptroller of the city of St. Louis and the justices of the county court from the fifth and sixth districts of St. Louis county, whose duty it shall be, immediately after this scheme goes into operation, to examine and verify the county indebtedness, as the same existed at the time this scheme went into operation, on the books of the county, as to bonds and all other claims, and to ascertain and declare the amount necessary for the payment of the current expenses of the county to such time, and to ascertain the balance of cash, after deducting the amount necessary for the payment of such current expenses, in the hands of the county treasurer and the source whence derived. And all collections made on account of taxes for interest and the parks, and that portion of said balance which was collected for general purposes within the extended city limits, shall be paid into the city treasury; and that portion which was collected for general purposes within the county of St. Louis, as constituted by this scheme, shall be paid into the treasury of said county; and the same course shall be pursued with reference to all moneys coming into the hands of the present county treasurer after this scheme shall go into operation. The term of the present county treasurer shall cease when the treasurer for the county of St. Louis, as herein constituted, shall have been elected and qualified. The county auditor shall properly account for all school moneys for which he is in any way responsible to the proper authorities, and all tax collections for school purposes, made either by the city or county of St. Louis for the present or any other year, shall be applied only to the support of public

schools. All debts and obligations due or payable, or belonging to the present county of St. Louis, shall be considered due and payable to the city of St. Louis; and the right to sue for and to adjust and collect the same or any part thereof, shall be vested in said city. The amount above ascertained for the payment of current expenses shall be paid in the manner provided by law out of the sum above reserved for such purpose.

SEC. 20. It shall be the duty of all existing officers of St. Louis city and county to assist in carrying out the provisions of this scheme, so far as any official act is necessary for that purpose, and in all cases in which said officers are continued in office under this scheme, their duties and compensation shall be the same as are now provided by law.

SEC. 24. The municipal assembly shall have power within the city of St. Louis to do all acts and perform all functions not otherwise provided for in this charter and not inconsistent with its terms, which have heretofore been done and performed by the county court of the county of St. Louis.

SEC. 32. In all cases where, according to the laws in force up to the time when this scheme shall go into operation, any public officer or other person was required to pay any money coming into his hands from any source whatever into the county treasury of St. Louis county, and where it is not otherwise provided in this scheme, or the charter framed under it, such officer or person shall, after the time aforesaid, pay all such money into the treasury of the city of St. Louis, at or within such times as he was theretofore required to pay the same into the county treasury; and if no time shall be prescribed by law for any such payments, then he shall pay the same monthly, on the first Monday of each month, into said city treasury, and shall take triplicate receipts therefor, stating the account on which such payment was made, one of which he shall file in the city auditor's office, and one with the comptroller, who shall charge the treasurer with the amount so paid; and the said auditor and treasurer shall keep accounts showing the account on which such payments were made and the source from which the money was derived. All such money shall be applied and used for the purposes for which it was collected, or for which it is made applicable by law, and in all cases when such money is not set apart or appropriated by law for specific purposes, the municipal assembly of the city may appropriate it to such municipal uses as it may deem proper: *Provided, however*, That all fines, penalties and forfeitures collected or accruing in the county of St. Louis, or on account of said county, or the people thereof, shall be paid in the manner and at times aforesaid into the county treasury of said county, and

duplicate receipts shall be taken as aforesaid by the officer or person paying the same, one of which he shall file with the county clerk of said county, who shall charge the treasurer with the amount so paid, and such money shall be appropriated and used as it is or may be provided by law: and provided further, That if any public officer or other person shall, at the time this scheme goes into operation, be in default in the payment of any such money into the said county treasury, he shall immediately pay the same into the said city treasury in the manner aforesaid, and the same shall be disposed of as herein provided.

SEC. 34. The municipal assembly shall have power to enact all ordinances that may be necessary to carry into execution the laws relating to state, county, city and other revenue within the city of St Louis, as enlarged; and such powers as are now vested by law in the county court of St. Louis county, or the clerk of said court, or the county collector and auditor, may be exercised by such tribunals and officers as may be provided by ordinance.

Sections 1, 6 and 9, of article 5 of the charter are as follows:

SEC. 1. For the support of the government of the city, the improvement thereof, and the payment of the public debt, the municipal assembly shall, by ordinance, annually levy and collect taxes on all subjects and objects of taxation, and all property within the city made taxable by law for state purposes; and shall establish the rates thereof, as follows, to-wit: On that portion of the city lying east of the present boundary as now laid out, on the assessed valuation thereof, a sum not exceeding one per centum for municipal purposes; and for the payment of the valid indebtedness of the city, existing on the thirtieth day of November, 1875, as also that of the county of St. Louis, existing at the time this charter and scheme go into operation, only such per centum as may be required to pay the interest thereon. *Provided, however*, That the foregoing limitations of per centum for the payment of the public debt shall not debar the said assembly from increasing the same from time to time, when the improved condition of the tax-payers will justify such increase, in order to gradually reduce said debt. On that portion of the city denominated "extended limits," lying west of and between the present boundary line, and the boundary line established by this scheme and charter, a sum not exceeding four tenths of one per centum for municipal purposes, and one-tenth of one per centum for the payment of interest on the valid indebtedness existing as aforesaid.

SEC. 6. All taxes collected for municipal purposes, from all sources whatever, shall be designated "Municipal Revenue," and the taxes collected for the payment of the public debt shall be designated "Interest and Public Debt Revenue," and the latter shall always be kept distinct from other revenues and held sacred for the payment of interest and the valid indebtedness of the city of St. Louis, existing on the thirtieth day of November, 1875, and of the county of St. Louis, existing at the time this charter goes into operation, and the bonds issued for the renewal thereof, and for no other purposes whatever.

SEC. 9. The appropriations of the municipal assembly for the payment of interest, for the payment of the public debt, for public improvements, and for the support of the city government during any one fiscal year, shall be in conformity with the requirements of the constitution of the State.

The above provisions of law, and the effect produced by them upon the city and county of St. Louis and the relations formerly existing between said city and county, may be summed up as follows:

The constitution of 1875 now in force in Missouri, in article 8, section 20, 21, 22, 23, 24 and 25, contains provisions for a board of freeholders, to propose a scheme for the enlargement and definition of the boundaries of the city of St. Louis, the organization of the government of the county of St. Louis, the adjustment of the relations between the city enlarged and the residue of St. Louis county, and the government of the city enlarged, by a charter in harmony with and subject to the constitution and laws of Missouri, which scheme if ratified by the voters shall be the organic law of the county and city, and the charter *the* organic law of the city, and take the place of and supercede the charter of St. Louis, and all amendments thereof, and all special laws relating to St. Louis county inconsistent with the scheme.

Furthermore, it is provided that the city and county of St. Louis thereafter shall be independent of each other, that the city shall assume the existing county debt and the park tax, and become the owner of the county build-

ings and property within its enlarged limits, and be exempted from all county taxation, and the city enlarged shall be entitled to the same representation in the general assembly, and collect the state revenue and perform all other functions in relation to the state in the same manner as if it were a county in the constitution defined; and the residue of the county of St. Louis shall remain a legal county of the state, under the name of the county of St. Louis.

By virtue of the above constitutional provisions, the scheme and charter went into force and effect, October 21, 1876, having been ratified at an election held August 22, 1876.

Although, in theory of law, the scheme and charter became operative upon October 21, 1876, yet, owing to the fact that the question of their adoption was litigated and contested, it was not until March 5, 1877, that it was determined by the St. Louis Court of Appeals that they had been adopted by the vote of the people.

The State ex rel. v. Sutton, 3 Mo. Ap. Rep. 388, at p. 421.

And from this decision an appeal lay to the Supreme Court of Missouri, and one was taken and subsequently abandoned.

The above statement furnishes the reason why the city did not move in the court below before the final decree of April 25, 1877, to be substituted in the place of the county herein.

The object of the constitutional provisions was to separate the city and county of St. Louis into distinct municipalities, and relieve the people of the city of St. Louis from the burden of maintaining three governments, as two would suffice. The county government was abolished within the city of St. Louis. The functions formerly

performed therein by the county government were conferred upon the city government.

This idea is plainly embodied in the constitution.

The important features of the plan of separation here to be considered are contained in section 23, of article 9 of the constitution, which provides that the city shall assume the whole of the county debt, and the city and county shall be independent of each other, and the city shall be exempted from county taxation, and the judges of the county court shall be elected by the voters outside of the city, and the city as enlarged shall collect the State revenue, and be entitled to the same representation in the State legislature, and perform all other functions to the State as if it were a county, and the residue of the county shall remain a legal county under the name of the county of St. Louis.

The office of the scheme and charter was to carry out these provisions. The scheme was to provide for the enlargement and definition of the boundaries of the city, the reorganization of the government if the county and the adjustment of the relations between the city enlarged and the residue of St. Louis county; and the charter was to contain a form and system of government for the enlarged city of St. Louis.

Section 2 of the scheme declares that the city of St. Louis and the residue of the former county of St. Louis are distinct and separate municipalities.

By section 10, the city assumes the whole of the existing county debt, in which is included the 700 county bonds delivered to the Pacific Railroad under the act of January 7, 1865.

By section 11, the municipal assembly of the city are required to make provision by ordinance for the payment of the county debt and interest thereon as the same matures, including, of course, the 700 county bonds in question; and said debt is to de considered a city debt, and is

to be transferred to the books of the city, and is to be embraced in all official statements of the funded liabilities of the city.

By section 13, all debts and obligations due, payable, or belonging to the former county of St. Louis, are to be due to the city of St. Louis, and the right to sue for and to adjust and collect the same is vested in the city, and this provision embraces the demand asserted in this action by the former county of St. Louis.

By section 32, where by law any person is required to pay money into the county treasury, thenceforward, if not otherwise provided, it is to be paid into the city treasury, and this enactment covers the money due and payable to the county treasury under the act of January 7, 1865.

Referring to the charter of the enlarged city of St. Louis, section 1, article 5, it will be seen that the city is required annually to levy and collect taxes for the payment of city indebtedness, and also indebtedness of the county of St. Louis, existing when the scheme and charter went into operation; and by section 6, the taxes so collected are to be kept distinct from the other revenues of the city and held sacred for the payment of interest and valid indebtedness of the city and county of St. Louis, existing at the time the charter went into operation, and the bonds issued for the renewal of said indebtedness.

The effect produced by the State constitution and the scheme and charter is manifest. The city of St. Louis has assumed the position formerly occupied by the county of St. Louis under the act of January 7, 1865. The installments of money, required by the act to be paid monthly into the county treasury, are due and payable to the city treasury. The bonds issued under said act, are a part of the bonded indebtedness of the city of St Louis. The payment of the bonds has been assumed by the city of St. Louis. The city is discharging the interest upon them as it accrues. The county of St. Louis, as

it existed when said bonds were issued, no longer exists. It has ceased to exist within the city of St. Louis, by operation of law; and, so far as said issue of bonds is concerned and the rights and liabilities growing out of the same are involved, the place of the county of St. Louis has been taken and is now occupied by the city of St. Louis. The city, in this matter, is the successor of the county of St. Louis, and is subrogated to the rights of the county.

The constitution says that the city "shall assume the whole of the existing county debt," and, as the city is burdened with the obligation, it is entitled to the rights possessed by the original debtor, whose place it has assumed; but, moreover, by section 13 of the scheme, which is the organic law of the county and city, it is provided that, "all debts and obligations due or payable, or belonging to the present county of St. Louis, shall be considered due and payable to the city of St. Louis, and the right to sue for, and to adjust and collect the same or any part thereof, shall be vested in said city."

The decree below establishes in favor of the county of St. Louis an equitable lien or charge upon the earnings of the Pacific Railroad in the sum of $4,000 per month, payable monthly from April 1st, 1876, and the further sum of $1,000, payable in each month of December, to meet the interest upon the 700 bonds issued under the act of January 7, 1865, until said bonds shall be fully paid off by the Pacific Railroad. The lien is a continuing one. It will terminate only with the extinguishment of the principal sum by the railroad company. The lien should, however, be decreed to exist in favor of the city of St. Louis. The county of St. Louis possesses no further interest in the matter. It has been discharged from its liability in the premises, and its place is occupied by the city of St. Louis. The city bears the burden, and should reap the benefit.

The scheme and charter are recognized by the Supreme

Court of Missouri as valid and existing provisions of law, in the case of St. Louis v. Sternberg, decided December 23, 1878, not yet reported. The opinion is printed in the *Central Law Journal* of January 3, 1879, vol. 8, p. 8. To appear in 69 Mo.

Also in State *ex rel*, Halpin v. Powers, *et al.*, decided December 2, 1878, and [redacted] reported, 68 Mo. 320.

Also in State *ex rel*, Burden v. Walsh, decided June 2, 1879, and not yet reported. To appear in 69 Mo.

Also in State *ex rel*, Att'y Gen'l v. McKee, *et al.*, decided June 2, 1879, and not yet reported. To appear in 69 Mo.

II. The main question in the record is the following, viz.: Under the law of January 7, 1865, and the proceedings between the county of St. Louis and the Pacific Railroad company by virtue thereof, was an equitable lien or charge upon the earnings of the road created for the payment of the interest and principal of 700 county bonds issued pursuant to said act of January 7, 1865, paramount to any subsequent lien or charge on the property, and enforceable against the earnings of the road in the hands of one having possession thereof by virtue of the foreclosure and sale of the road under a mortgage placed thereon subsequent to the year 1865?

In order to arrive at the correct solution of this question, it is necessary to give a condensed history of the transaction as it is embodied in the master's report, and it should here be observed that no exceptions were taken to the finding of facts therein contained.

The Pacific Railroad Company was incorporated by the legislature of Missouri, in 1849, for the purpose of building and operating a line of railway from St. Louis to Kansas City, on the western boundary of the State.

The enterprise was aided by the State to such an extent that as early as 1855 the credit of the State had under various legislative acts been loaned to the company for the completion of the road, in the shape of State

bonds, which with interest and principal amounted to about the sum of $7,000,000, and which the company had agreed to pay.

The legislature by an act approved February 10, 1864 (Laws of Missouri adjourned session 1863, 1864, p. 50,) authorized the Pacific Railroad company to borrow money for the completion of the main road to Kansas City and to issue 1,500 bonds of $1,000 each, bearing interest at seven per cent., with coupons attached, and having four, five and six years to run in equal proportions, to be secured by a first mortgage on the main line west of Dresden and to apply as much of the proceeds of said bonds as should be necessary to the completion of the road to Kansas City; said bonds to be sold as the money is required for the payment of the work, provided, that all of any one class of the bonds may be sold at one time; and the State relinquished is first lien and mortgage and right of forfeiture upon the road west of Dresden and retained a second lien and mortgage thereon; and it was further provided that no sale should be made under said mortgage without notice to the State, and the State should have the right to redeem the road from said mortgage, or purchase at the sale.

By section 2 the office of fund commissioner was created, to be filled by the appointment of the Governor, and to continue until the bonds issued for the completion of the road and the State bonds loaned the company with interest, were fully paid or exchanged for first mortgage bonds as thereafter provided in the act.

By section 3 the company are required to deliver to the fund commissioner the bonds authorized to be issued as aforesaid, and thereupon the State relinquishes its first lien and mortgage upon the road west of Dresden, and the fund commissioner is to negotiate the bonds and apply the proceeds to the completion and equipment of the road, and all the gross earnings of the

road from all sources are to be paid daily to the fund commissioner, and all other revenues thereof are to be taken possession of by him as they arise.

The duties of the fund commissioner are defined in sections 4 and 7 to be to pay for the construction, extension and equipment of the road out of the moneys arising from the sales of bonds, and out of other monies to pay for operating the road and to apply the net earnings, after paying his salary, in the payment of interest on the bonded obligations of the company, and to other purposes therein specified.

The company accepted the act, and pursuant thereto, by deed dated April 1, 1864, mortgaged its road from Dresden to Kansas City, to secure bonds to the amount of $1,500,000, with seven per cent interest, one-third of said bonds maturing in four years, one-third in five years and one-third in six years, respectively.

The office of fund commissioner continued to exist until it was abolished by an act approved March 31, 1868.

The county of St. Louis was a stockholder in the Pacific Railroad Company from 1855 to 1869, and the city of St. Louis was also a stockholder therein from 1854 to 1870.

In December, 1864, the company applied to the county court of St. Louis for a loan of county bonds to the extent of $700,000 to be used in completing the road to Kansas City.

The negotiations between the company and the county court were followed by an act of the legislature of Missouri, approved January 7, 1865, in these words:

SEC. 1. The county of St. Louis is hereby authorized to issue seven hundred county bonds of the denomination of one thousand dollars each, having twenty years to run, and bearing interest at the rate of seven per cent. per annum, payable semi-annually, the principal and interest payable in the city of New York, and loan said bonds to the Pacific Railroad Company, for the completion of said road; said bonds to be issued under such conditions as may be agreed upon between said county court and the board of directors

of the Pacific Railroad Company, such conditions to be binding on the parties, but shall not impair or affect the validity of the bonds after they are issued.

SEC. 2. The fund commissioner of the Pacific Railroad, or such person as may at any time hereafter have the custody of the funds of said railroad company, shall every month after said bonds are issued, pay into the county treasury of St. Louis county, out of the earnings of said Pacific Railroad, four thousand dollars, and one thousand dollars additional in each month of December, to meet the interest on the said seven hundred bonds; said payments to continue until the said bonds are paid off by the Pacific Railroad.

Upon the 10th day of January, 1865, the railroad company presented to the county court the written opinion of the counsel of the company, to the effect that if the act of January 7, 1865, was accepted by the company and carried into effect, the county would have an equitable lien or charge upon the earnings of the road for the payment of the bonds loaned and the interest thereon.

The counsel of the county, by an opinion dated January 14, 1865, advised the county court that the security of the county under the act would be secondary to that of the bondholders under the act of February 10, 1864.

The provisions of the act of January 7, 1865, were accepted January 18, 1865 by the county of St. Louis, and January 19, 1865 by the Pacific Railroad company, and the company obligated itself to pay the bonds issued under said act at maturity.

The bonds were issued as follows: 100 bonds, February 20, 1865; 200 bonds, March 7, 1865; 400 bonds, May 5, 1865; and said bonds were sold by the Pacific Railroad company and the proceeds thereof were used in the completion of the railroad.

By an act of the legislature approved March 31, 1868, (Laws of Missouri, 1868, p. 114), provision was made for the sale of the Pacific Railroad to pay the claim of the State pursuant to an act of February 22, 1851, and by section 5 it was provided that if the company within ninety

days from April 1, 1868, paid into the State treasury $350,000, and within ninety days thereafter an additional sum equal to $5,000,000, the road should be released and discharged from all claims and debts due the State, etc., and there should be no sale thereof.

By section 6 it was provided that in case the road was sold under sections 1, 2, 3 and 4 of the act, the State should assume the payment of the principal and interest due on $700,000 in bonds issued by St. Louis county as a loan to the company under the act of January 7, 1865, and also the floating debt of the company to the extent of $650,000; and by section 10 that all bids for the purchase of the road should assume, first, the payment of principal and interest on $1,500,000 first mortgage bonds issued under the act of February 10, 1864, and second the principal and interest due on the $700,000 bonds issued by St. Louis county to the railroad company under the act of January 7, 1865, and third, the floating debt to the extent of $650,000.

The road was not sold under the act of March 31, 1868, because the company within the time specified in section 5, paid into the State treasury the requisite amount and secured a release of the State's lien and the relinquishment of the debt due from the company to the State.

In order to accomplish the release of the state's lien under section 5 of the act aforesaid, and to retire the $1,500,000 bonds issued under the act of February 10, 1864, and known as the "Dresden bonds," the railroad company on July 15, 1868, executed its so-called first mortgage to Murdock, Punnett and Clark to secure $7,000,000 bonds, maturing twenty years from August 1, 1868, which mortgage covered the entire line, together with the appurtenances and franchises, and asserted itself to be a first lien thereon.

July 1, 1871, the so-called second mortgage to Morgan and Seligman, to secure the payment of $3,000,000 bonds

with interest, maturing twenty years after July 1, 1871, was executed by the company, and purported to be a second lien on the property and franchises.

April 19, 1872, a real estate mortgage conveying certain real estate in the city of St. Louis to secure $800,000 bonds, maturing twenty years after April 19, 1872, was executed.

The Carondelet Branch mortgage was executed October 1, 1873, covering the Carondelet Branch road and to secure $500,000 bonds maturing in twenty years from date.

July 10, 1875, the so-called third mortgage (under which the proceedings to foreclose below in the principal case were had,) to secure the payment of $4,000,000 bonds maturing May 1, 1895, and covering the railroad property, appurtenances and franchises, was executed.

All the bonds secured by the first mortgage, the second mortgage, the real estate mortgage and the Carondolet Branch mortgage were negotiated, and on November 11, 1875, when the original bill of foreclosure was filed herein, $2,300,000 of the third mortgage bonds had been issued and sold.

The county of St. Louis, upon October 28, 1875, filed a petition in bankruptcy in the U. S. District Court at St. Louis against the Pacific Railroad company, alleging acts of bankruptcy, and that the claim of the county upon the 700 bonds in question was an unsecured debt, and the company answered and denied the bankruptcy, and the county, on May 10, 1876, dismissed the proceeding and no adjudication therein was had.

The third mortgage was foreclosed by the decree of June 6, 1876, and all the property embraced in the mortgage was sold September 6, 1876, and conveyed to the purchaser by deed of October 24, 1876, in which it was recited that the county of St. Louis should not be prejudiced in its claim by reason of the sale.

The earnings of the railroad during the time it was in

the hands of the receivers averaged about $300,000 per month.

The above are the material facts.

The controversy in this case is between the purchasers of the Pacific Railroad under the third mortgage and the city of St. Louis as successor to the county of St. Louis. The rights of the former attached at the date of the mortgage July 10, 1875, and those of the latter relate back to May 5, 1865, when the delivery of the bonds under the law of January 7, 1865, was completed.

At the time the act of January 7, 1865, was adopted, the Pacific Railroad company was indebted to the State of Missouri in about the sum of $7,000,000 for State bonds issued to the company to aid in the construction of the road.

It was also indebted to the holders of the Dresden bonds issued under the act of February 10, 1864, in the sum of $1,500,000.

The Dresden bonds were secured by a first mortgage on the line west of Dresden.

The State was secured by a first lien on the road east of Dresden, and a second lien on the road west thereof.

There was also in existence a fund commissioner created by the law of February 10, 1864, having the custody of the revenues of the company from all sources, and by law required to apply the same, after paying the operating expenses of the road and his own salary, to the interest accruing on the Dresden bonds, and the surplus, if any, to paying interest upon and purchasing State bonds.

The indebtedness of the company to the State and to the holders of the Dresden bonds was subsequently discharged and extinguished out of the proceeds of the first mortgage placed on the property July 15, 1868.

The act of January 7, 1865, authorizes an issue of 700

St. Louis county bonds of $1,000 each, having twenty years to run and bearing interest at seven per cent, and empowers the county court to loan said bonds to the Pacific Railroad company for the completion of the road, upon conditions to be agreed upon by the county and the company, and provides that the fund commissioner of the Pacific Railroad or such person as may at any time thereafter have the custody of the funds of the company, shall every month after the bonds are issued pay into the county treasury out of the earnings of the railroad $4,000, and $1,000 additional in each month in December, to meet the interest on the 700 bonds; said payments to continue until the bonds are paid by the Pacific Railroad.

The act was accepted by the county and the company, and it created a charge upon the earnings of the railroad in favor of the county treasury in the sum of $4,000 monthly, and the additional sum of $1,000 in each month of December, to meet the interest on the bonds, and to continue until the bonds are paid by the Pacific Railroad.

It was not the intention of the legislature that the security given the county by the act should depend for its continued existence upon the existence of the office of fund commissioner, and hence provision is made that "the fund commissioner of the Pacific Railroad, *or such person as may at any time hereafter have the custody of the funds of said railroad company*, shall every month," etc., "pay into the county treasury of St. Louis county, out of the earnings of said Pacific Railroad, $4,000, and $1,000 additional in each month in December, to meet the interest on the said 700 bonds; said payments to continue until the said bonds are paid off by the Pacific Railroad."

The appellants contend that the county under the terms of the act was a creditor of the corporation without security, but the position is maintained only by ignoring section 2, and treating its provisions as if they had not been enacted.

Section 2 pledges the earnings of the railroad to the payment monthly of specific sums of money into the county treasury, to meet the interest on the bonds, and to continue until the bonds are paid by the company. A charge is created and imposed upon a designated fund, and the duty of enforcing the provision is enjoined upon the person having the fund in his possession. The county is given a lien on the earnings of the road for the interest accruing on the bonds, which is to continue until the bonds are discharged by the company.

The duty of providing money to pay the interest as it matures rests on the custodians of the road, and the earnings of the road are devoted to this purpose.

The county is not merely a creditor of the company; it is a creditor secured by the daily receipts arising from the use of the property.

If the act had read as follows,—*Section 1. The county of St. Louis is hereby authorized to issue 700 county bonds of the denomination of $1,000 each, having twenty years to run, and bearing interest at the rate of 7 per cent. per annum, payable semi-annually, the principal and interest payable in the city of New York, and loan said bonds to the Pacific Railroad Company, for the completion of said road,*—it would have contained all of the original act necessary to authorize the issue and loan of the bonds, and to create the relation of debtor and creditor between the railroad company and the county, and the debt would unquestionably have been an unsecured obligation.

But the act proceeds further, and by section 2 erects a scheme to secure the creditor by appropriating the earnings of the enterprise to the payment of the debt.

A law is not to be construed by overlooking essential features, and giving effect only to such portions as favor the construction sought to be placed on it. It is a com-

plete thing, and all parts are to be considered and harmonized, and effect given to every provision.

It is familiar doctrine that, in the exposition of a statute, the court seeks to ascertain and carry out the intention of the legislature in its enactment, and to give full effect to such intention, and, if practicable, the statute is to be construed so as to give it force and validity, rather than to avoid it and render it nugatory.

Appellants' counsel, however, proceed in the other direction, and construe the law so as to defeat not only the plain intent of the legislature, but also the clear understanding of the parties at the time the bonds were issued and delivered.

The purchasers of the third-mortgage bonds took the securities with full notice of the lien of the county. The act of January 7, 1865, printed in the general laws of Missouri (Sess. Acts, 1865, p. 335), was notice of the transaction between the county and the company, and of its authorization by the State.

The act of March 31, 1868, providing for the sale of the Pacific Railroad and the foreclosure of the State's lien thereon is a public act, and in section 6, it recites that there is due from the company to the county, principal and interest on $700,000 in bonds issued by the county as a loan to the company, under the act of January 7, 1865.

And by section 10, it is provided that, all proposals to purchase the road at the sale under the State lien, shall assume the payment of the Dresden bonds, and the principal and interest due on the $700,000 bonds issued by the county to the railroad, under the act of January 7, 1865.

The act of March 31, 1868, was followed by the first mortgage dated July 15, 1868, the second mortgage dated July 1, 1871, and the third mortgage dated July 10, 1875, and the fact therefore is that not only did the holders of the third-mortgage bonds have complete notice

of the lien of the county, but the first and second mortgages were negotiated under like conditions, and subject to the prior rights of the county.

The purchasers at the foreclosure sale of September 6, 1876, bought the road with full knowledge of the lien of the county, and its enforcement works no hardship upon them. The United States Circuit Court, on May 10, 1876, ordered the receivers of the road to pay to the county $41,000 on account of accrued interest, and foreshadowed the subsequent ruling in favor of the county on the main question.

The decree of foreclosure of June 6, 1876 warned those desiring to purchase at the sale, that the county claimed a prior lien over all other encumbrances, and was not prejudiced by the decree.

The price bid for the property, $3,000,000, and for which it was sold, was fixed upon the assumption that the lien of the county would be sustained, No prudent man could have acted on any other supposition.

The doctrine of estoppel cannot be invoked to defeat the lien. The county was a municipal corporation of limited powers. The act of its officers, the presiding justice of the county court and the solicitors of the county, in filing a petition in bankruptcy against the Pacific Railroad company, on October 28, 1875, and averring therein that the county was an unsecured creditor as to its claim under the law of January 7, 1865, did not operate to release any rights possessed by the county by virtue of that law. Of course it cannot be claimed for one moment that the presiding justice of the county court and the solicitors of St. Louis county, were authorized to release, by a direct proceeding, the lien of the county established by the act of January 7, 1865, assuming a lien existed. They were not the agents of the county for such purpose, and any attempt by them in that direction would have been without the scope of their powers and functions. Hence, as they could not di-

rectly release the lien, they could not accomplish the same result indirectly.

Their power to create an estoppel against the county is confined within the limits of their authority to bind the county by contract. It extends no further—and measured by this rule it is apparent that the act of the officials named, in asserting that the county had no lien, did not destroy the lien, if one was created by the law of January 7, 1865.

Nor is there any weight in the view that the county, by virtue of being a stockholder in the corporation, is bound by the recitals in the 1st, 2d and 3d mortgages; moreever the county sold its stock in 1869, before the 2d and 3d mortgages were executed.

It is respectfully submitted that the decree should be modified by substituting the city of St. Louis therein in lieu of the county of St. Louis, and in other respects affirmed.

LEVERETT BELL,

of Counsel for the City of St. Louis.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1879. No. 162.

GEORGE E. KETCHUM et al., Appellants,

vs.

THE COUNTY OF ST. LOUIS, Intervenor, Respondent.

STATEMENT AND ARGUMENT

For Respondent,

(In reply to Argument of James O. Broadhead and Melville C. Day,)

BY

FRANK J. BOWMAN,

Attorney for City of St. Louis, and County of St. Louis Respondent.

WASHINGTON:
JUDD & DETWEILER, PRINTERS.
1880.

Supreme Court of the United States.

GEORGE E. KETCHUM, ET AL., APPELLANTS,

vs.

ST. LOUIS COUNTY, RESPONDENT.

STATEMENT.

I.

With much of the legal history of the Pacific Railroad, (of Missouri,) this Court is already familiar.

In the case of Woodson *vs.* Murdoch, *et al.*, (22 Wall., p. 351,) the historical facts concerning the Pacific Railroad legislation, are so clearly and concisely stated, that we copy therefrom, as follows:

"In 1851, and at various times between that year and 1855, the Legislature of Missouri passed acts, lending its credit to the Pacific Railroad, a railroad whose line extends from St. Louis to Kansas City. By the same act it lent its credit also to two other roads. The object of the legislation was to secure the completion of the roads. The form in which the aid was extended, was this: The State made its bonds, some at twenty years, and others at thirty years, promising to pay the amount thereof to the company or its order. Coupons were attached; and by act of the Legislature the faith and credit of the State were pledged for the payment of the interest, and the redemption of the principal of the bonds.

"The company was, by the act, to make provision for the punctual payment of the interest and principal of the

bonds, so issued by the State, so as to exonerate the State from advances for that purpose.

"To secure this undertaking on the part of the company, the act provided that the net tolls and income of the road should be pledged for the payment of interest, and that the acceptance of the bonds, by the company, 'should become and be, to all intents and purposes, a mortgage of the road of the company, and every part and section thereof and its appurtenances, to the people of the State, for securing the payment of the principal and interest of the sums of money for which such bonds shall, from time to time, be issued and accepted as aforesaid.' This was to be a first lien or mortgage upon the road; and it was further provided by the act that if the company should make default in the payment of either principal or interest, no more bonds should be issued to it, and it should be lawful for the governor to sell the road and its appurtenances, at auction, to the highest bidder, on six months' notice; or to buy in the same at such sale for the State, subject to such disposition of the road or its proceeds, as the legislature might thereafter direct.

"Under these provisions, as to security, the State issued its bonds, for the benefit of the Pacific Railroad, to the extent of $7,000,000, or upwards.

"The company paid the interest on the bonds up to 1st July, 1859, but since that date had failed to do so.

"In 1864, the road not being completed, the legislature of Missouri authorized the company to borrow $1,500,000, payable in four, five, and six years, and to secure it by a first lien on the road west of a place called Dresden, the State waiving for this purpose and to this extent its priority of lien. The bonds given as evidence of this debt were called 'Dresden bonds.' * *

"In 1866 the road was finished and put in running order to the west line of the State; *but in order to effect this the company had, in* 1865, *received aid from St. Louis county, to the amount of* $700,000." (See case cited above.)

To determine whether the county of St. Louis shall be reimbursed for this expenditure, is the real issue involved in this cause.

II.

The parties seeking to deprive the county of payment, are subsequent mortgagees, among whom are Uriel Murdock and Luther C. Clarke, trustees of a so-called first mortgage of $7,000,000, the same parties who appear as complainants in the cause first above cited.

From the carefully prepared bill of complaint in that case, offered in evidence below, the Master, in his report, quotes, and says:

"On July 1, 1873, Uriel A. Murdock and Luther C. Clark, the trustees in the aforesaid 'first mortgage,' filed a bill of complaint in the circuit court of the United States for the western district of the State of Missouri to enjoin the Governor of the State from selling the property of the railroad under a lien which was claimed by the State still to subsist in its behalf. The nature and purpose of this case are disclosed in the case of Murdoch *vs.* Woodson, (2 Dillon C. C., 188,) and in the same case on appeal to the United States Supreme Court, (22 Wallace, 351.) In the bill of complaint it was averred as one of the *equitable*, if not legal, grounds for sustaining the release which had been made by the State of its lien, under the provisions of the act of March thirtieth, 1868, that if the road had been sold under the State's lien, the county of St. Louis and other creditors would have been foreclosed; but that the release by the State to the company left the stock of the city and county and the taxpayers of the county, amounting in the aggregate to $2,278,000, intact, and left the liability remaining on the proper party to pay the floating debt of the company *and the bonds issued by St. Louis county.* The said bill of complaint also contained the recitation. 'They (the complainants) say that the road was finally put in running order through to the western boundary of the State in the year 1866, but the Dresden bonds, together with the loan of the county credit, as aforesaid, proved insufficient to pay for such extension and for the repairs and equipments rendered necessary by the circumstances hereinbefore stated, and at the time of such completion of the road there remained due by the company (which was chiefly held by citizens of Missouri for labor and materials) a large floating debt, *which in equity and good conscience, together with the loan*

by St. Louis county, possessed claims for payment not inferior to those possessed by the State under its statutory mortgage.' " (See Record, p. 76.)

The Hon. William M. Evarts, of counsel for complainants, in the same cause urged before this Court, in a printed brief now here on file, that the payment to the county of St. Louis of the $700,000 by the Pacific Railroad was a part of the consideration paid by the road as the purchase price of the State's lien.

These mortgages are now here contending that there is no equity in the enforcement of the purchase price of the property they claim.

III.

To clearly show the grounds upon which a *statutory lien* is claimed, it is necessary to recite more fully the circumstances under which the lien was made by the county of St. Louis, and further reference is necessary to the above-mentioned act of February 10, 1864, as also to an act approved March 2, 1861. By the first section of the last-mentioned act it is provided that—

"Any person or persons holding any bond or bonds of the Pacific Railroad, issued in pursuance of the provisions of the act entitled 'An act to secure the completion of certain railroads in this State,' passed December 10, 1855, upon which the guarantee of the State has been endorsed, who shall, within five years after the passage of this act, deliver the bond or bonds so endorsed, held by him or them, to the treasurer of the State, shall be entitled to receive in exchange therefor a like number of the bonds of the State direct, bearing interest at the rate of six per cent. per annum; said State bonds each to be for the sum of one thousand dollars, and to be made payable at the same time and place as stipulated in the guaranteed bonds delivered to the treasurer of the State; and the guaranteed bonds so delivered to the treasurer shall be held by him for the State,

and said bonds shall thereby become the property of the State."

The first section of the act of 1864, authorizing the issue of the "Dresden bonds," further provided that—

"*All the net profits of the road shall be applied to the extension and equipment thereof until completed as aforesaid*, reserving, however, sufficient for the payment of the interest accruing semi-annually on said bonds actually sold, and after the completion of the road any surplus over the accruing interest shall be applied to the purchase of the bonds themselves."

The second section of the act of 1864, provided that—

"The office of fund commissioner is hereby created, *and shall continue, until the bonds issued for the completion of the road, and the State bonds loaned to said Railroad Company, with interest thereon, are fully paid out of the earnings*, or exchanged for the first mortgage bonds of said road, as hereinafter provided."

By the sixth section of the act, it was provided, that—

"It shall be lawful for the Pacific Railroad Company to issue first mortgage bonds, having not more than twenty-five years to run from the date of their issue, and bearing interest at six per cent. per annum, payable semi-annually, to the amount of the State bonds loaned to said main road, together with all interest due and unpaid; said mortgage bonds shall have the effect of first mortgage upon said road only to the extent of their exchange for bonds of the State, when the same are delivered up and canceled with unpaid coupons attached," &c.

[NOTE.—No bonds were issued under the provisions of this section.]

By the third section of the act, the company was required to deliver to the fund commissioner, the so-called "Dresden bonds," and he was required thereupon to negotiate the bonds, subject to the approval of the Governor, and the

President of the Railroad Company, the proceeds to be used for the purpose of the completion and equipment of the road. And it was further provided that "*All gross earnings of said road from all sources shall be paid in, daily, to said fund commissioner, and all other sources of revenue, belonging to or connected with said railroad, shall be under his control, and be taken into his possession as they arise.*"

The fourth and seventh sections of the act provide *for the distribution of the funds of the road*, by the Fund Commissioner, and are as follows:

"SEC. 4. Said Fund Commissioner shall, out of the moneys arising from the sale of bonds as aforesaid, upon proper vouchers, pay for the construction of the extension and equipment of said road as aforesaid; and out of all other moneys derived from other sources, as before designated, in his hands, and under his control, upon proper vouchers and receipts, he shall pay for the operating of the road; the payment for said construction and equipment shall be made upon vouchers of the chief engineer of said road, approved and countersigned by the president, specifying in proper detail the amount and character thereof; and the payment of the operating of the road shall be made upon vouchers and certificates of the superintendent of the road, approved by the president and chief engineer."

"SEC. 7. It shall be the duty of the Fund Commissioner to apply the earnings of the road, after paying the expenses of his salary, first, as provided in section one; second, to the payment of interest as the same shall become due and payable on the first mortgage bonds issued and exchanged, as provided in section six; and next, not to exceed six per centum dividend on the preferred stock, as provided in section eight; and the surplus, if any, to the purchase of the outstanding State bonds, with interest coupons thereon at the best market rates; provided, however, that in purchasing said bonds the price to be paid for them shall be first approved by the Governor. It shall be the duty of the fund commissioner further to examine, from time to time, the books, papers, and accounts of the road; and if at any time it shall appear to him that the same are not properly kept, the gross receipts of said road, or any part thereof,

are not properly paid over to him, or that irregularity exists in the construction or conduct of the road, to call the attention of the governor thereto, whose duty it shall be to examine into and correct such irregularities, in such manner as in his judgment may be right and proper."

By the eighth section of the act it was provided, that—

"The holders of the bonds of the State of Missouri, issued by the Pacific Railroad Company, are hereby authorized to invest said State bonds in the capital stock of said corporation," &c.

[NOTE.—No such exchanges, of bonds for stock, as by this section authorized, were made.]

The ninth section of the act provides that—

"It shall be the duty of the superintendent of the Pacific Railroad to provide that all the pay-rolls for the monthly payments of the employes on the railroad are made out correctly and furnished to the fund commissioner on the fifteenth day of each month, as also the proper vouchers for all the articles and materials purchased which may be necessary for the operation of the road; monthly reports of the condition of the road, together with a full statement of the business of the same shall be made by him to the governor of the State, who shall cause the same to be filed in the office of the Secretary of State; and any outlay deemed necessary beyond and outside of the actual operating expenses by the directors of the road shall be first approved by the governor and chief engineer before the same shall be paid by the fund commissioner."

This act of 1864 was entitled "An act for the extension and completion of the Pacific Railroad to the western boundary of the State at Kansas City, and the North Missouri Railroad to the Iowa State line; to complete the southwest branch of the Pacific Railroad, and reduce the State indebtedness."

By the eleventh section of the act the company was given sixty days in which to accept its provisions, and the same

was accepted by a formal vote of the stockholders of the company, the County Court of St. Louis oounty, then representing a considerable interest in the stock of the company, voting in favor of accepting the provisions of the act. (See Record, p. 80.)

The "Dresden bonds" having been found *insufficient to complete the road*, the county of St. Louis was solicited to make a loan of $700,000 for that purpose. On December 29, 1864, the county of St. Louis declined to make this loan unless security was given. (See Master's Report, Sub'd 10, Record, p. 63, and subsequent.)

Thereupon the Legislature of Missouri on the 7th of January, 1865, passed the following act:

"*Be it enacted by the General Assembly of the State of Missouri as follows:*

SECTION 1. The County Court of St. Louis county is hereby authorized to issue 700 county bonds of the denomination of one thousand dollars each, having twenty years to run, and bearing interest at the rate of seven per cent. per annum, payable semi-annually, the principal and interest payable in the city of New York, and loan said bonds to the Pacific Railroad Company *for the completion of said road*, said bonds to be issued under such conditions as may be agreed upon between said County Court and the Board of Directors of the Pacific Railroad Company, such conditions to be binding on the parties, but shall not impair or affect the validity of bonds after they are issued.

SECTION 2. The Fund Commissioner of the Pacific Railroad, or such person as may at any time thereafter have the custody of the funds of said railroad company, shall every month after said bonds are issued pay into the county treasury of St. Louis county, out of the earnings of said Pacific Railroad, $4,000, and $1,000 additional in each month of December, to meet the interest on the said 700 bonds; said payments to continue until said bonds are paid off by the Pacific Railroad. This act to take effect and be in force from and after its passage."

The terms of this act being accepted by the St. Louis County Court, as also by the Pacific Railroad Company, and the bonds having been issued and proceeds applied in

the improvement of the road, a lien equitable and statutory was decreed by the court below as against the income of the road, and that judgment, it is by respondent contended, should be affirmed.

ARGUMENT.

I.

THE ACT PASSED BY THE STATE LEGISLATURE OF MISSOURI, ON JANUARY 7, 1865, THE ACCEPTANCE OF ITS PROVISIONS BY THE PACIFIC RAILROAD COMPANY, AND BY THE COUNTY OF ST. LOUIS, CONSTITUTED A CONTRACT BINDING UPON THE COUNTY OF ST. LOUIS, THE PACIFIC RAILROAD, AND ALL PARTIES THEREAFTER CLAIMING TITLE, BY SUBSEQUENT CONVEYANCES FROM THE RAILROAD COMPANY.

By the terms of the act of 1864, the possession of the Pacific Railroad had been by its consent placed in the vertual possession of a trustee, designated as a fund commissioner, selected by the State, and clothed with power to receive daily "*all gross earnings of said road from all sources; and all other sources of revenue belonging to or connected with said railroad;*" as also to receive the proceeds realized by the sale of the $1,500,000 "Dresden bonds."

The Fund Commissioner, as trustee, was to disburse the funds received from these provided sources, as follows:

First. Out of all moneys coming into his hands arising from the sale of bonds as aforesaid, upon proper vouchers, pay for the construction of the extension and equipment of said road. (Section 4.)

Second. From moneys otherwise received he is required to pay upon proper vouchers therefor the operating expenses of the road. (Section 4.)

Third. From the *net earnings* of the road the fund commissioner was then to make payments in the following order:

1st. His salary as Fund Commissioner. (Section 7.)

2d. "*All the net profits of the road shall be applied to the extension and equipment thereof until completed, as aforesaid*, reserving, however, sufficient for the payment of the interest accruing semi-annually on said bonds actually sold, *and, after completion of the road*, any surplus over the accruing interest shall be applied to the purchase or payment of the bonds themselves." (Section 1.)

3d. The payment of interest, as the same shall become due and payable on the first mortgage bonds issued and exchanged, as provided in section six.

(No such bonds were issued, the parties preferring to retain their State bonds.)

4th. Six per cent. dividend on preferred stock.

(None was ever issued, for the obvious reason that parties preferred to retain their State bonds.)

5th. To the purchase of outstanding State bonds, with interest coupons thereon, at the best market rates. (Sec. 7.)

The time of duration, of the office of Fund Commissioner, was fixed by the second section of the act which provided, that the office should "*continue until the bonds issued for the completion of the road, and the State bonds loaned to said railroad company, with interest thereon, are fully paid out of the earnings, or exchanged for the first mortgage bonds of said road*, as hereinafter provided."

The foregoing state of facts continued until December, 1874, when it became apparent that the proceeds realized upon the sale of the "Dresden bonds" would be insufficient to complete the road to the desired terminus, at Kansas City.

In the memorial addressed to the County Court on behalf of the Pacific Railroad urging the court to make the loan of $700,000, the following was the language used: "We ask it because for the reasons above stated *we must raise this much money or let the work stop where it is*, and our people lose the benefits to result from a completed road." (See Record, p. 62.)

The people of St. Louis county had then already assumed a heavy burden of debt and taxation in aid of this road; $1,200,000 of its then worthless stock had been subscribed for by the county and paid by a direct tax; $500,000 more had been taken and paid for by the city of St. Louis. (See Record, p. 61.)

Under these circumstances the County Court refused to make the loan, unless security was given. Different forms of security were proposed, some favoring the one form, and some another. Mr. Taussig, whose plan with amendments was subsequently adopted, and embodied in the act of January 7, 1865, testified before the master: "*We intended to get the best possible security*, without crippling the road, and without defeating the object." (See Record, pp. 64 and 73.)

The intention was evidently to secure the county, and it is difficult to see how it could have been more effectively done. The whole income of the road was permanently vested in a trustee, designated as a "Fund Commissioner." After expending the proceeds of the "Dresden bonds" he was to *use the net income of the property in the completion of the road*, and after the road was completed, *and not before*, he was to apply the *net income* to the payment of the "Dresden bonds."

After exhausting the proceeds of the "Dresden bonds," it is by all parties here conceded that it required the further sum of $700,000 to complete the road.

Until the road was thus completed no sum except the semi-annual interest could be paid upon the "Dresden bonds."

The act of 1864 was "An act for the *extension and completion* of the Pacific Railroad to the western boundary of the State at Kansas City," &c., and the expense of completing the road *was, by the express term of the act, prefered to the payment of the principal of the "Dresden bonds" issued under the provisions of that act.* The act of 1865, under which the loan from the county was made, expressly declares the sole purpose of the loan to be "*the completion of said road.*"

It is therefore apparent that even the holders of the "Dresden bonds" had no cause of complaint as against the security given the county upon the income of the road.

The payment of the comparatively small sum to the county monthly for interest upon its loan, from the income of a property costing many millions of dollars, that was, by this loan from the county, completed and put in condition to earn an enormous amount of money, in no way interfered with the only priority that could possibly be claimed for the "Dresden bonds" as against the county, *i. e.*, the payment of the semi-annual interest.

Equity seemed to require that the county should be repaid from the first earnings of the road, in place and in anticipation of which the county's money was loaned and used for the road's completion, but as this would present the question of an interference with the previously acquired right of the "Dresden bond" holders, it was avoided by providing a permanent security for the payment of the county's interest in such manner as not to in any manner interfere with existing rights.

The State waived its right of payment of both principal and interest upon its $7,000,000 of bonds in favor of the county. For, as we have seen, by the act of 1864 the State bonds, and interest thereon, were only to be paid from the income and earnings of the road remaining after the payment of these claims which, by the act of 1864, were given priority over the claims of the State; a like priority of payment was, by the act of 1865, given to the county for securing the payment of its interest until the principal debt was fully paid.

Four thousand dollars per month and an additional one thousand in the month of December, a sum equal to the annual interest at seven per cent. on the $700,000 loaned, was set apart from the earnings of the road in the hands of the trustee, the Fund Commissioner, who, under the law then in force, expressing the terms of the contract, was to continue in office until the whole State debt was paid from the earnings of the road, or until the road had become in such solvent condition that the holders of the State bonds were willing to exchange them for bonds of the road.

What more complete and perfect security could the county have asked or desired than the security thus given?

II.

Subsequent legislation, lessening the security previously given to the county of St. Louis, would be an impairment of the obligation of a contract and void.

The Legislature of Missouri had no power to pass *any* act impairing the obligation of *any* contract, *much less* to impair the obligation of a contract to which the State itself was a party. See Cooley's Const. Limitations, p. 273.

There is no pretense that the county has consented to any legislation or act surrendering the security first given. If, therefore, any act has been passed by the Legislature of Missouri whereby the security thus given has been impaired or taken away, such act is an impairment of the obligation of the contract made with the county, and therefore void.

It may be a question worthy of the careful consideration of the learned counsel for the bondholders how far it may be advantageous to the interests of their clients, to insist that, the county of St. Louis has not the same rights, against those now in possession of the funds, derived from operating the road, that it clearly had as against the funds in the hands of the Fund Commissioner.

The position for which we shall contend, unless com-

pelled to do otherwise by adverse decision, is that no law effecting or impairing the obligation of the contract made with the county has been passed. That the withdrawal by the State and Pacific Railroad under the provisions of the act of 1868, from carrying out the contract made with the county, pursuant to the previous acts of 1864 and 1865, was without prejudice to the county, inasmuch as it was by the provisions of the act of 1865, made immaterial, whether the then acting trustee, the Fund Commissioner, was or was not continued; inasmuch as it was provided that the payments should be made to the county by "*such person as may at any time thereafter have the custody of the funds of said railroad company.*"

It will be observed by an inspection of the Record (p. 65) that the act of January 7, 1865, as first presented by Mr. Taussig, simply provided that the payment should be made to the county "by the Fund Commissioner;" but before its final passage, from an abundance of caution, it was amended by inserting the words "or such person as may at any time hereafter have the custody of the funds of said railroad company." This clearly shows that there was at the time the intention, on the part of the State, to secure the county, regardless of any changes that might take place in the future management of the property.

Any other interpretation of the act of 1865 than above contended for would lead to serious complications. For if the change of the control of the property affects the county's claim to a preferred payment of the amount of the annual interest upon its loan from the income of the road, then it is perfectly apparent that the act of 1868 abolishing the office of Fund Commissioner was an impairment of the rights of St. Louis county under an existing contract.

But we do not so contend; but, *per contra*, urge that the act of 1868 in no manner lessened or impaired the rights of the county to its prior claim upon the income of the road.

In case of Murdoch *vs.* Woodson, (22 Wall., p. 351,) it was by this Court held, that the act of 1868 was not a re-

lease of the State's lien, but in effect a sale of the State's lien to the Pacific Railroad Company.

It follows that the company, as the purchasers of the State's lien, took the road and its properties, subject to all the prior existing liens upon the road and its income that were outstanding as against the State in favor of third parties at the time of the purchase. Priority of payment had been given by the State to the county to the extent of the annual interest upon the $700,000. This right of priority still exists as against the Pacific Railroad as the purchaser of the State's lien, and all claiming title subsequently acquired from the Railroad Company.

For when the lien of the State was purchased by the Pacific Railroad, and the office of Fund Commissioner abolished, under the provisions of the act of 1868, and the income and earnings of the road, its franchise and properties, turned over to the officers of that corporation, they then received, and continued thereafter to receive, the funds arising from the operation of the road, chargeable with the same trust in favor of the county of St. Louis, that had previously attached thereto in the hands of the Fund Commissioner, and all parties claiming title to the property, through or under them, in like manner receive the funds charged with the same trust.

III.

THE WRITTEN OPINION OF THE ATTORNEY OF THE PACIFIC RAILROAD, PRESENTED, FILED, AND MADE PART OF THE PUBLIC RECORDS, OF THE ST. LOUIS COUNTY COURT, BY THE PRESIDENT OF THE COMPANY, AS AN INDUCEMENT FOR MAKING THE LOAN, MAY PROPERLY BE REGARDED AS A PART OF THE CONTRACT ITSELF, SO FAR AS EFFECTS THE INTERESTS OF THE PACIFIC RAILROAD, AND ALL CLAIMING TITLE SUBSEQUENTLY ACQUIRED FROM THE COMPANY.

This letter shows clearly the understanding of the parties to the contract under which the loan of $700,000 was made. It is set forth in the intervenor's petition, and reads as follows:

ST. LOUIS, *January* 10, 1865.

Col. GEO. R. TAYLOR,
President Pacific Railroad.

DEAR SIR: In reply to your communication of yesterday, touching the construction and effect of the second section of the act approved January, 1865, I have to say:

The Fund Commissioner is a public officer, created by the act of February 10, 1864. His position and duties as defined by that act are in general terms those of a general trustee or receiver, holding, with the assent of the company (as expressed by the acceptance of the act) the earnings of the company upon certain expressed trusts, among which are, paying expenses of operating, &c., the road, paying interest and principal of loan under that act, and paying interest upon, and purchasing, State bonds. It is in the last of these only that the State, as *cestui que trust* under the relations so established, has an interest which could be affected by legislation. The first section of the present act authorizes the County Court to loan, &c., under such conditions as may be agreed upon.

Although not mentioned in express terms, the act presupposes, or rather, anticipates, an agreement to the effect that the money for the payment of interest upon these bonds shall be furnished the county out of the earnings of the company.

But as such an agreement could not be carried into effect,

for, under the act of February 10, 1864, such earnings are not within the control of the company, but are in the hands of the Fund Commissioner (as trustee) for the benefit of the State as a *cestui que trust*, the 2d section is enacted for the purpose of giving effect to such agreement, and makes it the duty of the Fund Commissioner to pay out of the earnings of the road certain sums monthly.

If the act should be accepted by the company, and the county court should make the loan authorized, the act would be binding upon all the parties in favor of the county court, to wit, the Company, the Fund Commissioner, and the State; and neither could object to its execution.

An agreement, executed by the company, expressing its assent to such appropriation of the earnings of the road, *would then, in my opinion, create in favor of the county an equitable lien or charge upon the earnings pro tanto.*

The direct authorization of such an appropriation of the earnings, or rather the direction to the Fund Commissioner, (the trustee,) to pay this monthly appropriation out of funds to the benefit of which it (the State) is entitled, is unquestionably, in my opinion, a waiver or postponement of the interest of the State, *cestui que trust* in favor of the county, to the extent and for the purposes specified in the act. *The act admits of no other construction.* The first section of the act which authorizes the loan, is enacted by the State purely in its legislative capacity.

The second is, in effect, a partial release of its interest, for the State can have no legal control over this fund, except as a *cestui que trust*, under the relations heretofore established, and then only over its interest. In this respect it occupies no higher relation than an individual would, holding the same claims. By directing therefor, with the assent of the company, a different appropriation of the funds to which it was before the passage of the act entitled, it postpones or waives its own claim to that extent in favor of the party authorixed by this act to receive, viz.: the county of St. Louis. The claim of the county upon the earnings of the road under this act could be easily enforced. The Fund Commissioner is a public officer, and where his duty is well defined, and, as under the second section of this act, purely ministerial, he may, in case of a failure to pay over the amount monthly as directed by the act, be proceeded against by mandamus, and compelled to perform the duty enjoined upon him by law.

Very respectfully, your obedient servant,

GEO. E. LEIGHTON.

The defendants below, fully appreciating the importance attaching to such a declaration by the officers of the defendant company, as to the intent, purpose and proper interpretation of the act of 1865, and contract made thereunder, as set forth in the above letter, in their answer made positive denial that the "loan of seven hundred thousand ($700,000) dollars of bonds was made to the company on the faith of any such representations, or agreement, or construction, or any such opinion or letter of said Leighton;" and averred as a matter of fact, "that said letter relates solely to the rights of the railroad company and bondholders, as against the State, and does not refer to the rights of the county in the premises at all." (See Record, p. 47.)

The Master found that, on the 10th day of January, (three days after the act was passed authorizing the loan, and eight days before its final acceptance by the county,) the letter of Geo. E. Leighton was presented to the County Court by the President of the Pacific Railroad. (See Record, p. 65.)

The master, in his report, says:

"*I find that this communication* [referring to the letter of Geo. E. Leighton] *related to the matter here in controversy, and not as respondents allege in their answer*, 'solely to the rights of the railroad company as bondholders, as against the State.'"

The master further found and reported that this letter—

"*Was filed and preserved by the clerk of the County Court among the records thereof, and that it was apparently drawn up with the view to influence the judgment of the County Court in the premises.*" (See Record, p. 67.)

And so conclusive was the evidence in support of the finding and report of the master, that no exceptions were taken thereto by the appellants.

In view of such a record, so clearly showing the understanding of the parties, at the time of making the loan, we think it unnecessary to make further reply to the argument

of Mr. Day, of counsel for appellants, in Brief, pages 58 to 70, inclusive.

IV.

THE LIEN GIVEN THE COUNTY OF ST. LOUIS WAS UPON ALL GROSS EARNINGS OF THE PACIFIC RAILROAD, FROM ALL SOURCES, "AND ALL OTHER SOURCES OF REVENUE BELONGING TO OR CONNECTED WITH SAID RAILROAD;" SUBJECT TO A PRIOR LIEN, FOR OPERATING EXPENSES, PAYMENT OF SALARY OF FUND COMMISSIONER, AND INTEREST UPON THE "DRESDEN BONDS."

The act of 1864 had provided, that—

"All gross earnings of said road, from all sources, shall be paid in daily to said Fund Commissioner, and all other sources of revenue belonging to, or connected with, said railroad, shall be under his control, and be taken into his possession as they arise."

The Fund Commissioner was to pay the operating expenses of the road, his own salary, the semi-annual interest on the "Dresden bonds," and all other sums coming into his hands were to be applied to the *extension and completion of the road*, to Kansas City, until completed and properly equipped.

The loan from St. Louis county was for the identical purpose, to which the Fund Commissioner was authorized, by the act of 1864, to apply the income of the road.

The act of January 7, 1865, authorized the county to "loan said bonds to the *Pacific Railroad Company for the completion of said road.*"

The application made by the Pacific Railroad, to the County Court of St. Louis county, on December 23, 1864, was as follows:

"At a late meeting of the Board of Directors of the Pacific Railroad, the undersigned were appointed a committee to confer with your honorable body, in relation to the present condition and prospects, of the Pacific Railroad, and to ask the aid of the county *in completing this great work.*" (See Record, p. 62.)

The records of the County Court of December 29, 1864, show the following:

"The court this day takes up the application of the Pacific Railroad, for the issuing of $700,000 St. Louis county bonds, *in aid of the completion of said road.*" (See Record, p. 63.)

The bill of complaint of Murdoch and Clarke *vs.* Woodson, duly sworn to and offered in evidence in this cause, recites the fact that—

"The road was finally put in running order through to the western boundary of the State, in the year 1866; but the Dresden bonds, together with the loan of the county credit *as aforesaid, proved insufficient to pay for such extension, and for the repairs and equipments rendered necessary,*" &c. (See Record, p. 76.)

There can be no doubt, nor is there any dispute, that the loan made by the county of St. Louis was for the completion of the road, and no greater sum was loaned, than was needful for that purpose.

If, then, the Fund Commissioner had refused to pay any monthly installment of interest when due, and had been proceeded against in manner, as suggested in the letter of Mr. Leighton, what possible defense could we have made?

The net income was more than ample to pay his salary, the interest on the Dresden bonds, and the $4,000 per month to the county.

The county's money had been applied, in lieu of the *income of the road*, to construction purposes. Therefore the Dresden bondholders could not have enjoined or complained of such payment, even had the whole debt of the county

been preferred. The State had consented to, and directed the payment.

V.

Substantial and Effective as was the Security of the County when given, it has Become even more so, by Reason of the Unprecedented Prosperity of the Road.

The evidence in this case, discloses the fact that the gross income of the Pacific Railroad, even when operated under the double disadvantages, of a receivership, and general depression of business, amounted to $300,000 *per month*, or $3,600,000 per annum. (See Master's Report, p. 81.)

If we make a liberal estimate of 60 per cent. for operating expenses, we have remaining a net income of $120,000 per month, or $1,440,000 per annum, a sum in excess of the amount of interest upon all mortgages of $436,000 per annum, from which, if we deduct the $49,000 per annum due the county, would still remain $387,000 as net profits to those operating the road, or 6 per cent. upon a capital stock of $6,450,000.

VI.

The Act of 1868 Recognized the Lien Claim of the County, and made all Necessary Provision for its Security and Payment.

The act was entitled, "An act for the sale of the Pacific Railroad, and to foreclose the State's lien thereon, and to amend the charter thereof."

The first section of the act required the Governor to sell the Pacific Railroad.

The second section provides that, upon the sale of the road, the sum for which the road shall be sold shall not be less than $8,350,000.

The third section provided that, the purchaser should change the gauge of said road to conform to that of the Union Pacific.

The fourth, that the Governor should execute and deliver a deed to the purchaser.

These sections contemplated a sale by auction, as provided in the act of February 22, 1851, reserving the State's lien.

By the fifth section of the act of 1868, it was provided that if the Railroad Company should, at any time within ninety days from the 1st of April, 1868, pay into the treasury of the State the sum of $350,000 in bonds of said State, or in money, then, in that event, the Governor should not advertise the said road for sale; and if said company, within ninety days thereafter, paid into the treasury the sum of $5,000,000 in cash or bonds, the Governor should, upon proper receipts from said treasury, execute and deliver to said road a deed for all the right, title, and interest which the State had in the road, and said road should be fully discharged from all claims due the State, and all liability growing out of the issue of the bonds of the State, in aid of the construction of the road.

The sixth section provides for the payment of the principal and interest of the $700,000 loaned by the county of St. Louis, under the act of January 7, 1865, and also the floating debt, not to exceed the sum of $650,000.

The eighth section makes provision for the election of directors in case the State became the purchaser of the road.

The tenth section provides that "all bids and proposals for the purchase of said road shall assume first the payment of principal and interest due, and to become due, on the $1,500,000 first mortgage bonds, issued under the act of February 13, 1864; second, the principal and interest due on the $700,000 bonds issued by the county of St. Louis to the Pacific Railroad Company, under the act of January 7, 1865; and the floating debt of said railroad company existing at the time of the passage of this act, not to exceed the amount of $650,000.

The eleventh section contains a provision that the Pacific Railroad shall be exempt from any interference by legislation with its rates of toll for a period of ten years.

Section 12 provides that "in case of sale, as prescribed in sections 2 and 5, the office of Fund Commissioner is hereby abolished," and all provisions of an act, entitled "an act for the extension and completion of the Pacific Railroad to the western boundary of the State, at Kansas City, and the North Missouri Railroad to the Iowa line, to complete the southern branch of the Pacific Railroad, and to reduce the State indebtedness," approved February 10, 1864, applying to a Fund Commissioner and prescribing his duties and powers, are hereby repealed."

It will be observed that in this act of 1868, recitation of the fact, is twice made, that the loan of $700,000 had been made by the county of St. Louis under the act of 1865, to the Pacific Railroad. It is recited in the sixth section, which provides that if the State becomes the purchaser it shall assume the debt. It is recited in the tenth section, where it is provided that all bids and proposals for the purchase or lease of the road shall assume it. The tenth section provides for the assuming of the $700,000 by any party who should become the purchaser of the road, if resold by the State. The intent and purpose of the act is clear, in providing for the assumption by such purchaser of the $700,000 indebtedness to the county of St. Louis. The old company was, in any event, bound to pay it. If the State's lien was sold to the company the lien of the county was continued without further legislation. This is unquestionably the correct view. Mr. Evarts, speaking for these bondholders in the case of Murdock *vs.* Woodson, so understood the act. He says: "Should the State be the purchaser, immediate steps should be taken for sale upon proposals advertised for by the Governor, and all such bids shall assume the principal and interest of $1,500,000 Dresden mortgage bonds, principal and interest of $700,000 bonds of

St. Louis county, the floating debt of the company to an amount not exceeding $650,000, and the change of gauge."

A careful examination of the act of 1868, shows that three sales, are there contemplated and provided for; first the sale at auction under the first, second, and third sections; second, the sale of the State's lien on the road under the fifth section, which was made, and which sale has been affirmed by this court in the case above cited. The third was for a re-sale by the State, in case it became purchaser. If the sale was made under the first, second, and third sections, the State was required by that act to become the purchaser, unless the railroad was sold for a sum exceeding $8,350,000, and the State assumed to pay the debt of the county of St. Louis and $650,000 of the floating indebtedness. The total floating indebtedness at that time, in 1868, amounted to $1,092,848 of audited debt (see record in case of Murdoch *vs.* Woodson.)

The question naturally arises, if the total debt was then $1,292,848, why the State assumed only $650,000 of the debt, and the debt of the county of St. Louis? The answer is obvious, if our position is correct—that the county of St. Louis has a lien superior in equity to the lien of the State.

The State had been operating the road from 1864 to the time of the sale, 1868. *Debts had been contracted for operating expenses, which were liens superior to the State lien in equity*, and which the court in equity would have sustained as against the State lien, and given them priority. This indebtedness had been contracted for supplies and material during that period, and the State was in equity bound to give preference to those claims.

A committee was appointed to investigate which of these claims were entitled to priority as against the State's lien, and they found that $650,000 of these claims were entitled to such priority, because they were liens contracted as stated above. The $700,000 was a prior lien to the State's, because

the State, by its own action, had consented to release the revenues of the road, and to give the county of St. Louis security for that amount. Hence, provision was made for the $700,000 and the $650,000, while no provision was made for that portion of indebtedness which was not a lien upon the road.

It will be observed, that the act also makes provision in the tenth section, for the assumption of payment, by any person who should purchase from the State, of the sum of $700,000 and also $650,000. Why was it that the Legislature, who had this matter before them, made no provision for the protection of the county after the State's lien was released, as against the road, under the provisions of the fifth section?

There is but one answer that can be made to this. It is that they well knew at the time that the county of St. Louis was secured by its lien; *that it needed no legislation to further protect the county's interests, if the lien of the State was sold under the fifth section.* The State was bound to carefully guard the county's interest, for at a time when the credit of the State was largely impaired, at a time when the State bonds could not be sold at anything like their face value, the county of St. Louis had come forward and furnished $700,000 to complete the road, when the State's investment without that would practically have been lost. The county furnished that aid necessary to extend the road, which made of utility all the efforts and expenditures previously made by the State. It had already been carefully secured by the act of 1865, and it was clearly the intention of the Legislature to pass no act that would endanger or lessen that security.

VII.

The equitable lien of the County of St. Louis is superior to the claims of the subsequent Mortgagees.

The payment of the "Dresden bonds," as previously shown, was, by the act authorizing their issue, postponed in favor of the *completion of the road*, and the parties receiving them accepted them subject to that condition.

The State gave preference to the county as an inducement to the county to loan its funds, and thereby give value to the State's previous investments.

The first mortgage bonds were issued by the Pacific Railroad to purchase the State's lien of about $10,000,000, for the sum of $5,000,000, as provided in the act of 1868, and to pay the principal of the "Dresden bonds."

As against both these purposes, the county had both a legal and equitable priority to payment.

As to the second and third mortgage bonds there can be no question of the prior and superior equity of the county's claim. Its loan had created the value of the property upon which their lien subsequently attached.

The second mortgage bonds were issued, mainly, for the purpose of funding the floating debt of the road; and the third mortgage, under which the road was foreclosed, for the questionable purposes disclosed in the record of Case No. 242, pp. 29 to 37.

The real estate bonds may properly be considered as not involved in question, as there was a special security given therefor, ample and sufficient in all respects.

The Carondolet Branch bonds were given independently

of the main line, and specially attach to the property in aid of the construction of which they were given.

The equitable claim of the county is concededly equal to that of other parties furnishing aid subsequently, without security, for like purposes. The claims of all such parties have been admitted superior to the rights of the mortgagees, and fully paid; not one dollar, for supplies furnished the Pacific Railroad, or any other indebtedness brought to the attention of the court below, remains unpaid, except the claim of the County of St. Louis.

A large portion of the floating debt was paid by the proceeds of the second mortgage bonds, and the remainder, about $350,000, by the receivers of the court, under the orders of the court; and this, with permanent improvements, and installments of second mortgage bonds paid and retired, aggregated an expenditure of $700,000 more than the net income of the road during the time it was held by the receiver. And this deficit the purchasers under the sale were required to make good. (See Record, p. 80.)

How could these claims be regarded in equity as superior to the claims of the County of St. Louis? The court below did not so regard them; it ordered payment of the unpaid interest due the county up to March, 1876—$41,000.

On the 10th of May preceding the foreclosure, upon hearing had, it was—

"*Further ordered*, That the order heretofore made in this cause, on the 3d of April last, so far as the same relates to the payment, by the receivers, to the County of St. Louis, of the amount of forty-one thousand dollars, claimed to be interest due to said county, be, and the same is, so far modified as to empower said receivers to pay said $41,000 to said county, on the express condition that the said county shall refund the same when and as this court may hereafter order, if this court shall decide, on proper hearing had, that said county is not entitled to receive the same. *The court hereby reserves for further hearing* the determination of the

rights of all parties to this cause, so far as the same relate to the demand of said county." (Record, p. 43.)

On the sixth day of June, the same day on which the decree of foreclosure was entered, the following order was made:

"By *consent*, it is ordered, that the consideration of the lien claim of St. Louis County herein, be continued to the next term of this court." (Record, p. 44.)

The decree of foreclosure contained the following provision:

"It is further ordered, adjudged, and decreed that *nothing in this decree contained shall be construed to prejudice, in any manner, the claim of the County of St. Louis to a lien on the property and franchises of the said Pacific Railroad*, alleged by said county to exist, as fully appears by the amended petition in this cause, filed by said county, for securing the payment of a certain debt of the said Pacific Railroad, to said county, for the sum of $700,000, and interest thereon, and alleged and claimed by the said county of St. Louis, to be a prior lien therefor over all other incumbrances upon said property and franchises, *the question of the existence and priority of said lien to be hereafter determined by this court, if not otherwise satisfactorily adjusted.*" (See Record, Case 242, p. 46.)

A sale having been made of the property under this decree of June 6th, on the 18th of September following, a motion was made by counsel for Ketchum to approve the sale. No action was, at the time, taken thereon. (See Record, Case 242, p. 46.)

On the 23d of September, the court overruled the demurrer to the intervening petition of St. Louis County, and delivered a lengthy and able opinion, passing upon all the issues involved. (See Record, p. 45, and "Appendix.")

On the 12th of October, 1876, directed and—

"*Ordered*, That that the receivers reserve from the funds now in their hands, or which may hereafter come into their

hands, the sum of twenty-eight thousand dollars, being the amount claimed by the County of St. Louis as interest on a loan of seven hundred thousand dollars, bonds loaned the Pacific Railroad, for the months of April, May, June, July, August, September, and October, 1876, the same to be held subject to the further orders of this court." (See Record, p. 46.)

On the 24th of October following, the Court affirmed the sale, and form of deed, to James Baker, the purchaser; the deed containing the same recital concerning the interest and line, claimed by the County of St. Louis, as set forth in the decree. (See Record in Case 242, p. 57.)

VIII.

The Appeal is not taken by the Real Party in Interest.

As between the appellant bondholders and the County of St. Louis there is really no substantial conflict of interest.

They can sustain no injury by the affirmance of the judgment below, for the income of the road, as shown by the record, is ample for the payment of both.

As previously shown, the gross income of the road, under the most disadvantageous circumstances, is $3,600,000 per annum. (Master's report, p. 81.)

Supposing this to yield a net income of only 37½ per cent., leaving 62½ per cent. for operating expenses, we still have a net yearly income of $1,350,000 with which to pay six per cent. interest on $7,000,000 first mortgage bonds, *i. e.*, $420,000; seven per cent. on $3,000,000 second mortgage bonds, $210,000; seven per cent. on $4,000,0000 third mortgage bonds, $280,000; eight per cent. on $800,000 real estate bonds, $64,000; six per cent. on $500,000 Carondolet Branch bonds, $30,000, or a total of $1,004,000, leaving $346,000, and after deducting $49,000 to pay the county's

interest, there is still remaining $297,000 net income per annum, equal to an annual dividend of 37⅛ per cent. upon the present capital stock of the successor company, $800,000.

Clearly the present controversy, is between the present holders of the road and the county; and presents the question whether the profits of the parties now operating the road shall be further increased by defeating the payment of a just claim.

IX.

The Attorney of the County Court, had no power to release the Lien of the County, and never claimed or attempted to exercise such power.

The County Court of St. Louis County had but a limited agency for the people of the municipal corporation, over which its jurisdiction extended.

The record shows that the special attorney of the county, on the day of his employment, (October 28, 1875,) filed a petition in bankrupty against the Pacific Railroad, on the alleged ground that the County of St. Louis was an unsecured creditor, to the extent of $700,000. The object of this petition fully appears by an inspection of the answer and cross-bill of Thos. P. Akers and the County of St. Louis, set forth in the record of the original case, No. 242, on pages 24 to 37, inclusive. Reference thereto will show that it was believed by the officials of the county, that under a mortgage, fraudulently made with the intent and purpose of effecting a foreclosure thereunder, the officers then in charge of the affairs of the Pacific Railroad were conspiring together to effect such a foreclosure as would deprive the county, and its citizens, of their rights and interest as stockholders in the Pacific Railroad.

It was then thought desirable to invoke the extraordinary powers of the court, in bankruptcy proceedings, to prevent the consummation, if possible, of so fraudulent a purpose.

To this end, without deliberation, the bankruptcy proceedings were instituted, and afterwards voluntarily dismissed by the county's attorneys, upon becoming convinced, upon deliberation, that they could not be maintained.

The action of the county in that regard is plainly stated in its reply in this cause, as follows:

"Complainant admits that its then counsel admitted and charged in said petition that the county of St. Louis was an unsecured creditor in the principal sum of $700,000, and that it now claims to be wholly unsecured as to that principal sum, but claims only a lien upon the property, franchise, and earnings of said Pacific Railroad for accruing interest of $4,000 per month, and $1,000 additional for the month of December. That as to whether its then counsel, at the time of filing said petition in said district court, was sufficiently advised of the rights and interest of the county in the premises, as to correctly plead and set forth the same, it is not now sufficiently advised to positively aver; but is informed and believes that its counsel was not then sufficiently informed of all the facts, in the premises, to state the same with accuracy; and that shortly after the filing of said petition in the district court, the same was voluntarily dismissed by the county of St. Louis as inaccurate in statement, and insufficient in law. Wherefore, complainant says that the filing of said petition did not constitute in law a waiver of the statutory lien of said county."

X.

It is Unnecessary to Inquire Concerning the Additions to the Original Trust Property, or to Separate the Funds Arising from any such Additions, from the Original Trust Fund; as no Question is Presented Requiring such Separation.

The funds, upon which the original lien was given, in the hands of the Fund Commissioner, was the total income of the Pacific Railroad derived from its property and use of its franchises. It was then comparatively near completion,

and the additions since made, are relatively small. But if, for argument's sake, we should concede that its properties have been doubled, and that the income of such additions, a one-half of the whole, is not properly chargeable with the lien of the county, we would still have remaining chargeable with the trust, a one-half of a gross income shown by the record to amount to $300,000 per month, or a net income of about $120,000 per month, one-half of which would amount to $60,000 per month, from which it is easy to satisfy the county's claim of $4,000 per month, without inquiry as to the prior equities attaching to the remainder. It is useless, therefore, to discuss questions and principles that are not, from the nature of the facts found, here involved.

XI.

The Argument of Counsel for Appellants is adverse to the interests represented by them in the main cause.

In case No. 242, the same counsel ask a dismissal of the appeal, and an affirmance of the judgment of foreclosure on the ground that it was a *consent decree, consented to by the corporation and its stockholders.*

See motion to dismiss appeal, Case No. 242.

In support of the motion to dismiss, there is presented the agreement between C. K. Garrison, holder of the third mortgage bonds, and the stockholders of the company acting through their committee, N. A. Cowdry, Robert Cutting, Jr., and others, *agreeing to a foreclosure*, on condition that stockholders should thereafter receive from Garrison, an *agreed amount of new stock, in such new corporation, as shall be formed after the foreclosure.*

See motion to dismiss, pp. 29–33.

That such an agreement, as to a *foreclosure by consent*, was entered into between the third mortgage bondholders, and

the stockholders of the company, is admitted in the answer of the Pacific Railroad, made by N. A. Cowdry; as also, that it was agreed "*to give all the stockholders the same number of shares, or equity, in the property as they had before.*"

See answer of Pacific Railroad to motion to dismiss, p. 5, § 6.

By reference to the "affidavits and documents, filed in support of the motion to dismiss appeal;" (Case No. 242,) it appears that there was an agreement between all the third mortgage bondholders, whereby it was stipulated that they "should be protected impartially in the new issue of bonds and stocks," and that this agreement has been carried out: so that as concerns the third mortgage bondholders, there has practically been no foreclosure.

See "affidavits and documents in support of motion to dismiss appeal," pp. 10 to 15.

It is apparent, that, in all the foregoing arrangements, the County of St. Louis, as a *secured creditor*, holding a preferred lien, could in no manner be interested or concerned. But if, as *now* contended by the counsel for appellees in this case, *the County of St. Louis was an unsecured creditor*, then it requires no argument to show that all that was done in effecting this "*foreclosure by consent*" was in fraud of the County's rights, and cannot be sustained or affirmed by a court of equity.

There is no escape from this conclusion: a court of equity could never give its sanction to so fraudulent a connivance between the bondholders and stockholders of a debtor corporation, to effect a foreclosure whereby the just claims of creditors would be defeated, and the interests of the stockholders preserved.

But if, as we insist, the county *was secured* by an equitable and statutory lien, that could not be affected by the foreclosure proceedings, all unsecured creditors being fully paid, then such agreement of re-organization, *would work no fraud* or injury, and *might properly be sustained;* otherwise clearly not.

The stockholders here complaining, Cowdry and others, could and should have made their defence in the court below; they failed to do so, and have no just ground of complaint.

All that was done in the court below was properly done. The appeal in 242 should be dismissed, and the judgment in this case affirmed.

The county was powerless to sustain its objections as a creditor to a foreclosure in the court below, for in the opinion of that court, it had a prior lien, and was not therefore interested as a creditor in opposing the foreclosure. (See Appendix; Opinion of Judge Dillon.)

The county's interest in the stock was disputed, at most it was only that of trustee for tax-payers entitled to exchange certain tax certificates for stock of the road, they had not made the exchange, and it was doubtful if the county had any interest in the stock on account of which it could defend. (See Record in Case 242, p. 24.)

To now take from the County of St. Louis the right to the lien recognized by the decree of the circuit court, and at the same time affirm the decree of foreclosure, would work a great hardship and do irreparable injury. We feel confident that such a proposition will not find favor before this high court of equity, as against the rights of a just creditor, that stands with clean hands before the Court, asking its protection as against the fraudulent contrivances here exposed.

XII.

A Statutory Provision, gave Sanction, and Authority, to the Manner and Form in which the Security was given to the County.

It becomes, therefore, unnecessary to discuss at length, the special bearing of the cases, cited by appellants.

The case of Rogers *vs.* Hock's Exrs., 18 Wendell, 344, is clearly not in point.

In that case, the fund, if obtained by the *covenantor*, was to come into *his own* possession; if he failed to perform his agreement, it only gave a right of action against him at law, to the extent of the amount he improperly retained.

In this case, the *fund appropriated* and set apart to the benefit and *use of the county*, was in the *possession of an officer of the State;* the authority was given, and duty imposed upon the officer of the State, by an act of the Legislature, to make certain specified payments from the funds in his charge, as such officer; and the act of 1865 not only directed the manner in which the Fund Commissioner was to dispose of the fund, *but by an authoritative statutory provision, imposed this trust:* "*Upon such person as may, at any time thereafter, have the custody of the funds of said railroad company.*"

No person could thereafter assume the custody of those funds, without having imposed upon him *the same obligation, and trust*, that had in the first instance been imposed by the law-making power of the State upon the Fund Commissioner.

Respectfully calling the attention of the Court, to the able opinion of Judge Dillon, and numerous authorities cited by associate counsel, particularly to "Jones on Railroad Securities," 114 to 120, and cases there cited, I respectfully submit that the decree of the Circuit Court should be affirmed.

FRANK J. BOWMAN,
Of Counsel for Respondent.

APPENDIX.

Opinion of Judge Dillon.

United States Circuit Court, Eastern District of Missouri, September Term, 1876.

Case in judgment: Lien of County.

In 1864, while the State of Missouri was in full possession of the revenues of the defendant's road, upon certain express trusts, which it was provided were to continue until the State bonds loaned to the company were paid or exchanged, by an act of January 7, 1865, the County of St. Louis was empowered to loan said company its bonds, which was done, and accepted by the company. Section 2 of said act authorized the person who had theretofore been in custody of the earnings of the road for the State (called a Fund Commissioner) to pay into the county treasury, out of said earnings, a sum sufficient to meet the interest on said bonds loaned by said county as it accrued: *Held*, that by said act the State waived its lien and right to all the earnings of the company, to the extent of the sum required to pay the interest on said bonds, and that the county was, *pro tanto*, substituted as to that amount in the place of the State, with a lien or charge to that extent as effectual as the State before possessed.

Effect of Act as between the Company and the County.

As between the company and the county, the effect of the acceptance of the act, and the issue of the bonds by the county under it, was to convert the provisions of the second section into a contract, by which the company consented that the Fund Commissioner, or his successor, should, out of the earnings of the railroad, pay the sum necessary to meet the interest on said bonds, until they were paid by the company. This created a lien, statutable in its origin and equitable in its nature, on those earnings as they arise, which may be enforced by the county so long as the bonds which it loaned to the company remain unpaid.

General Rule of Equity as to Equitable Liens.

If a debtor, by a concluded agreement with a creditor, sets apart a specific amount of a specific fund in the hands, or to come into the hands, of another, from a designated source, and directs such person to pay it to the creditor, which he assents to do, this is a specific appropriation binding upon the parties, and upon all persons with notice who subsequently claim an interest in the fund under the debtor.

Mortgagees Charged with Notice.

The mortgagees, under a mortgage made subsequent to the acts of 1865 and 1868, authorizing the lien or charge, and noting the facts that the county had made the loan, and that it was unpaid, are charged with the notice of all the act contains.

Petition by the County of St. Louis to Establish a Lien or Charge on the Fund in Court.

A general demurrer to the petition was submitted. Mr. Bowman, Mr. Garesche, and Mr. Clover, for the County.

Mr. Broadhead, Mr. Litton, and Mr. Baker, for the Mortgagees.

DILLON, Circuit Judge.

Under the authority of the act of January 7, 1865, the county of St. Louis issued and loaned to the Pacific Railroad its twenty years' seven per cent. bonds, to the amount of $700,000; the railroad company agreed to pay the interest on the said bonds as it fell due, and, at maturity, to pay the principal. The principal is not yet due, but until the recent embarrassment of the company, it has regularly paid to the county the amount required to meet the interest on the bonds. In 1868 the company made a first mortgage of its property and franchises to trustees to secure a loan of $7,000,000; and in 1871, a second mortgage to secure a further loan of $3,000,000. Subsequently, in 1875, it made a third mortgage,

which is the one herein sought to be foreclosed, and in respect of which a decree of foreclosure has been passed, subject to the first and second mortgages, and reserving all the rights of the county of St. Louis.

The first and second mortgagees are not before the Court on the present application, but the application is resisted by the third mortgagees, between whom and the county of St. Louis the present controversy exists. The point of the contest is this—the county claims that it is entitled to a lien or equitable charge upon the earnings of the railroad company to the extent necessary to pay the interest on the $700,000 loan, and to continue until the bonds of the county are paid by the railroad company, or the purchasers of the property and franchises thereof, under the decree of foreclosure; and that the lien or charge specifically attaches to the earnings of the road, and follows the road into whosesoever hands it may pass.

On the other hand, the mortgagees maintain that obligation of the railroad company to the county is unsecured; that it is a debt at large—or, at all events, that the right of the county is subordinate to the rights of the mortgagees and of the purchasers at the foreclosure sale.

The question has been very fully and ably argued at the bar, and as the result of that argument has led us both to a clear conviction, we proceed to state our conclusion and briefly the grounds upon which it rests.

The determination of the point in issue must depend upon the intention of the Legislature and of the parties in interest at the time, 1865, when the county made the loan. These parties mainly were then the State, (which sustained at that time the double relation of sovereign and creditor towards the railroad company,) the Railroad Company, and the County of St. Louis. The intention of the parties must be gathered from the language of the act of January 7, 1865, and the resolutions and acts of the company and the county in executing the authority it conferred, these being viewed in the light reflected upon them by the known circumstances

surrounding the parties and the object which was intended to be accomplished.

To these intrinsic circumstances, shown in the legislative history of the road, the briefest reference only will be made. In 1849 the Legislature chartered the Pacific Railroad Company, with power to build a line of railway nearly three hundred miles long, from St. Louis to Kansas City; in 1851 the work of construction commenced, and in that year, and down to 1855, the Legislature had passed acts loaning the credit of the State to the company to aid and secure the completion of the road. This aid was in the shape of State bonds having not less than twenty or thirty years to run from the date of their issue. The company agreed to make provision for the payment of these bonds, interest and principal, and the State was secured by a statutable lien, with power of sale. Down to and during 1855, $7,000,000 of State bonds had been issued; down to 1861, when the rebellion broke out, only about 180 miles of the road had been completed. The civil war suspended the work of constructing the road, nor was the work resumed until the Legislature passed the act of February 10, 1864, (Laws, 1864, p. 50,) which has a material bearing upon the present controversy. This act authorized the company to borrow $1,500,000 to complete the road, to be secured by a first lien on the line west of Dresden, the State waiving for this purpose and to this extent its prior lien. The money was obtained, and while the company was extending its road in 1864, the road was raided by the insurgent forces, and further aid was needed both to repair the injuries and to complete the line. The act of February 10, 1864, contains provisions in respect to the Fund Commissioner, who is referred to in the act of January 7, 1865, which it is essential to notice. The office of Fund Commissioner was created by the act of 1864, which provided that the office "shall continue until the bonds (*i. e.*, the Dresden bonds, so called,) issued for the completion of the road, 'and the State bonds loaned to the said company,' with interest thereon, are fully paid or exchanged for the first mortgage bonds of said road, as here-

inafter provided." All gross earnings of the road from all sources of revenue shall be under his control and possession as they arise.

This officer was to pay out all moneys for construction and equipment and for operating the road. The duty of this officer, in the application of the net earnings of the road, is prescribed by section 7, as follows: 1, his salary; 2, interest of first mortgage bonds exchanged under the act; 3, dividend on the preferred stock, which the act authorized to be created; and the surplus to the purchase of outstanding State bonds. The State was thus, in 1864, in full possession of all the revenues of the company, upon certain express trusts, and this possession it was contemplated and provided should continue "until the State bonds loaned to the railroad company," having still many years to run, and upon which the Pacific Railroad Company had paid no interest since July, 1859, were paid or exchanged.

It may be implied from the legislation of March 31, 1868, hereafter adverted to, that the holders of State bonds did not exchange them for bonds of the company, under section 6, nor convert them into preferred stock, under section 8, of the act of February 10, 1864. Now, in this condition of affairs, the State, by its Fund Commissioner in possession for its own security of all the revenues of the road; the road without credit, and in ruinous condition, and its line uncompleted; the funds derived from the Dresden bonds exhausted; and further aid being necessary, the act of January 7, 1865, was passed, the object of which was to secure the needed assistance by the loan to the company of the credit of St. Louis county to the extent of $700,000.

Section 1 of the act last named authorized, but did not require, the county court to loan the company its 7 per cent. twenty-years bonds "for the completion of the road," upon such conditions as the county court and the directors of the company might agree upon, subject, of course, to the provisions of the act itself. The county court accepted the act. The board of directors of the company likewise accepted it, and agreed to observe and faithfully perform its obligations,

and soon afterwards the bonds of the county were issued and the proceeds used by the company to complete its road. The road was finished the following year, and the interest on the bonds has been paid by the company to the county down to and including May, 1875. What provision was made to secure the county for this large loan to the company? It was not a gift or donation by the county. It was not a purchase by the county of the stock of the road. The act only authorized the county to loan its credit or bonds to the company. The company was, as we have seen, in no condition to meet the interest on the bonds unless the provisions in the act of 1864, for the sequestration of its revenue by the State, and for the benefit of the State, were modified.

Hence we see the object and necessity for the second section of the act of January 7, 1865. It can hardly be supposed that the county would loan this large sum to a company whose property was already mortgaged to the extent of near or over ten millions of dollars, including unpaid interest, and all whose revenues were appropriated and actually going into the possession of the State, and were to continue to go there until the large debt of the State was paid—accordingly, we find that the second section of the act made, and was intended to make, effectual provision for the security of the county. That section is as follows:

"The Fund Commissioner of the Pacific Railroad, or such person as may at any time thereafter have the custody of the funds of said railroad company, shall, every month after said bonds are issued, pay into the county treasury of St. Louis County, out of the earnings of the Pacific Railroad Company, $4,000, and $1,000 additional in each month of December, to meet the interest on said 700 bonds, said payment to continue until said bonds are paid off by the Pacific Railroad."

Now, the effect of this section, when accepted and acted upon by the county and company, was simply this: Before this the State had a complete and perfect lien upon, and right to receive, all the earnings of the company; it im-

pliedly consented to waive its lien and right to receive all the earnings in favor of the county to the extent of $700,000, and the county was *pro tanto* substituted as to the $49,000 per year in the place of the State, with a lien or charge to that extent as effectual as the State before possessed. Why is this not the effect of what was done?

The principal parties in interest in this transaction were the State, Pacific Railroad, and the County, and they all agreed to the arrangement. As respects the State, the effect of the acceptance of this act by the company and the county, was that the State consented to waive in favor of the county its prior right to the $49,000 per year out of the earnings of the company; as between the company and the county the effect of the acceptance of the act, and this issue of the bonds by the county under it, was to convert the provision of the second section into a contract, by which the company consented that the Fund Commissioner, who had the right to receive all its funds—or any other person who should, at any time thereafter, have the custody of its funds—should every month, out of the earnings of the railroad, pay the specified sum necessary to meet the interest on the bonds, which payment it was provided should continue until said bonds were fully paid by the railroad company. Unless something has since changed the rights and relations of the company and the county, it seems almost too clear for argument that this constituted a specific appropriation of the company, with the consent of the State, of $49,000 per year of the earnings of the company, in the hands of a trustee, in favor of the county. If the Fund Commissioner was still "*in esse*," and in receipt of the earnings of the road, can it be doubted that at the instance of the county he could be compelled, by mandamus or other proper proceedings, to pay the specified sum each month into the county treasury? Here was a consummated contract, the fund out of which the payment was to be made, the amount, the place, and purpose of the payment were all definitely fixed, and the duty of making the payment was absolutely declared. It is certain there was no change

in the relation of the parties down to the act of March 31, 1868, by virtue of which, the Pacific Railroad, in consideration of $5,000,000 paid to the State, procured a release for all existing claims, title, and interest of the State, in and to the Pacific Railroad, and its property. The effect of the act in this regard has been authoritativeiy settled in the case of Murdock *vs.* Woodson, 2 Dillon, 188, S. C.: on appeal, 22 Wall., 351.

It is not necessary to state more at large to what is there decided. It is only material here to notice that the act of 1868 recites the existence of the debt to St. Louis County, and makes provision for the payment in case the road should be sold. But if it should not be sold, and if the provisions of the fifth section of the act should be accepted by the company, as turned out to be the case, then the company remained *in esse* and the owner of its property and franchises, and no further provision than then existed for St. Louis County was necessary. As the act of 1868 made provision for closing the relations of the State as a creditor of the company, it abolished the office of Fund Commissioner. (Sec. 12.)

It has been contended in argument by the counsel for the mortgagees that the effect of the repeal of this office was to terminate any trust which the second section of the act may have created in favor of the county. But there is a satisfactory answer to that position, even if the legislative power over the rights of the county be as absolute and unlimited as claimed by the counsel. In the legislation of 1868 the General Assembly, so far from evincing any intention to impair or destroy the rights of the county, whenever it made any provision in that regard it was one recognizing and intended to protect and secure those rights. Besides, the contingency of the repeal of the office of Fund Commissioner was anticipated in the second section of the act authorizing the loan by the county to the company, and provision was made that, in that event, the duty which had before been devolved on that officer should *ipso facto* devolve on such person as might at any time thereafter have

the custody of the funds of the railroad company. It is our judgment that the effect of the agreement of the company with the county, to specifically appropriate its earnings as provided by the second section of the act of 1865, is to create a lien or charge statutable in its origin, and equitable in its nature, on those earnings as they arise, which may be enforced by the county so long as the bonds which it loaned to the company remain unpaid. This was the view expressed by Mr. Leighton, the attorney of the company at the time, as shown by his letter of January 10, 1865, and his opinion is unquestionably a sound exposition of the purpose and effect of the act.

It is not necessary to go into the general learning on the subject of equitable liens or charges, since the rights of the parties in the case before us essentially depend upon the construction of the act of 1865. But the accepted doctrine of courts of equity, in respect to equitable liens or charges, will be found, we think, to support the conclusion we have reached. The cases clearly establish this legal proposition:

If a debtor, by a concluded agreement with a creditor, sets apart a specific amount of a specific fund in the hands, or to come into the hands, of another from a designated source, and directs such person to pay it to the creditor, which he assents to do, this is a specific appropriation, binding upon the parties and upon all persons, with notice, who subsequently claim an interest in the fund under the debtor. This proposition would sustain the right of the county in the present case.

It is urged, however, that the mortgagees, under the third mortgage, had no notice of the rights of the county, but they are bound to notice the acts of the Legislature of 1865 and 1868, the one authorizing the lien or charge, and the other recites the facts that the county has made the loan, and that it was then unpaid. As the mortgage was made subsequent to both of these acts, the mortgagees are charged with notice of all that they contain. (Record, p. 83.)

Supreme Court of the United States.

GEORGE E. KETCHUM, ET AL.

vs.

COUNTY OF ST. LOUIS, INTERVENOR.

No. 162.

BRIEF OF P. PHILLIPS,

For Defendant in Error.

R. O. POLKINHORN, Printer.

Supreme Court of the United States.

GEORGE E. KETCHUM, ET AL.

vs.

COUNTY OF ST. LOUIS, INTERVENOR.

No. 162.

BRIEF OF P. PHILLIPS,

For Defendant in Error.

A bill in equity was filed 11th November, 1875, to foreclose a mortgage by the Pacific Railroad Company, a corporation of the State of Missouri, bearing date 10th July, 1875, the defendants being the company and the holders of two prior mortgages.

On 3d April, 1876, a receiver was appointed, and "leave granted to the county of St. Louis to make answer to the bill and defend against the same."

On 20th April, 1876, the county of St. Louis, "by leave of the Court, comes and files its intervening petition." In this the county claims a lien for interest upon bonds loaned to the company under the act of 1865. p. 25.

A decree of sale was entered on 6th June, 1876, in which it is ordered "that nothing therein contained shall be construed to prejudice in any manner the claim of the county of St. Louis to a lien on the property and franchises of said Pacific Railroad, alleged by said county to exist, as fully

appears by the amended petition in this cause, filed by the said county for securing the payment of a certain debt of the said railroad to said county for $700,000 and interest thereon, and alleged and claimed by the county to be a prior lien therefor over all other incumbrances upon said property and franchises; the question of the existence and priority of said lien to be hereafter determined by this court, if not otherwise satisfactorily adjusted." p. 29.

A demurrer was filed to the petition, the consideration of which was postponed to the succeeding term of the Court.

June, 1876, on motion of counsel for parties holding third mortgage bonds, any party to the Record had leave to answer the petition, and it was referred to the Master to report the facts, and his conclusions thereonand the law arising on said petition, &c., with leave to parties to file exceptions.

On 23d September, 1876, the demurrer was overruled, with leave to complainants to file an answer to the intervening petition, which was done January, 1877.

The Replication of the County was filed February, 1877. p. 53.

The report of the Master was made on 6th April, 1877, and on 25th of the month, the cause having been set down for hearing on the finding of the facts as reported by the Master, and no exception being taken, it was decreed "that the county of St. Louis is entitled to an equitable lien or charge upon the earnings of said Pacific Rail Road to whomsoever the same may be transferred or conveyed, prior and paramount to any mortgage or other lien thereon; that the earnings of said Pacific Rail Road be, and the same are hereby charged with a lien in the sum of $4,000 per month, payable monthly from the 1st day of April, 1876, and the further sum of $1,000, payable in each month of December, to meet the interest of $700,000 loaned by

said county of St. Louis to the Pacific Rail Road, on the 18th January, 1865 (until the said $700,000), shall be fully paid off by the Pacific Rail Road; the said equitable charge is hereby decreed to exist and be enforceable on said earnings of said Rail Road property and franchise against the funds in the hands of the Receivers and the purchasers under the mortgage sale heretofore ordered." p. 81.

From this decree the respondents to the petition appeal.

The case is this—

In 1849 the Legislature of Missouri incorporated the "Pacific Rail Road Company," for the purpose of constructing a Rail Road from the City of St. Louis to Kansas City, on the western border of the State, the length of the road being about 300 miles.

To aid in this construction, the State, by several acts, authorized the issue of State Bonds, amounting, in 1855, to seven millions of dollars, the company agreeing to provide for principal and interest. The State was further secured by a statutable lien with power of sale of all the company's property.

In 1861, one hundred and eighty miles had been completed, but the further prosecution of the work was interrupted by the Civil War, and the work was not again resumed until 1864.

On 10th February, 1864, an act was passed by which the State took full possession of the road and appointed a Fund Commissioner who was to receive all the revenues and make all payments as directed by the act, and in order that the road might be completed the company was authorized to borrow $1,500,000, and for this purpose the State released its first lien on the uncompleted portion of the road, to wit,

from Dresden to Kansas City, reserving a second lien thereon.

By the terms of the act it was provided that the office of Fund Commissioner should continue until the Dresden bonds, so-called, and the State bonds, loaned to the company, were fully paid, or exchanged for the first mortgage bonds of the road.

The provisions of the act are particularly set forth in the findings, and are cited by Judge Dillon in his opinion. p. 85.

The money was raised under this act and applied to the extension of the work, but the road was raided by the hostile forces, and so materially injured as to require a further loan for its completion.

The condition of Missouri and its rail roads at this time is graphically described by Mr. Justice MILLER, in *Woodson* vs. *Murdock:*

"The railroad companies," says he, "emerged from the war with their roads in a state of repair which hardly admitted of use, and the rolling-stock so deteriorated that new supplies were indispensable. Their credit was low, their means exhausted, and their property apparently worth but little. They were unable to meet their obligations to the State and were largely in arrears for interest on the State bonds. The State itself was in little better condition. To the heavy burdens of increased taxation imposed by the Federal Government, was now added the necessity of paying interest on the large debt of the State incurred in aid of the rail road companies."

In this helpless condition of the road, without credit and without means, the State, through its "Fund Commissioner," being in possession of all the revenues of the road, the amount of the Dresden bonds exhausted, the company applied to the county of St. Louis for a loan of $700,000.

The action on this subject by the County Court is set forth in the findings at p. 64. One proposition was that the

Company should pay the interest in advance to the County, and the State should relinquish its mortgage on the rolling stock in favor of the County, and that the question of the loan should be submitted to a vote of the tax-payers.

This was substituted by the adoption of a resolution "that this Court will concur in the propriety of the passage of the following act securing the completion of the said road and the interest of the County of St. Louis in the issue of said bonds."

The proposed act provides for the issue of the bonds, the Fund Commissioner of the Company to pay, every month, $4,000 to the Treasurer of the county to meet interest, said payment to continue until said bonds are paid by the Company.

On the 7th January, 1865, the Legislature enacted as follows:

Sec. 1st. The County Court of St. Louis County is hereby authorized to issue 700 County Bonds of the denomination of one thousand dollars each, having twenty years to run, and bearing interest at the rate of seven per cent. per annum, payable semi-annually, the principal and interest payable in the city of New York, and loan said bonds to the Pacific Railroad Company for the completion of said road; said bonds to be issued under such conditions as may be agreed upon between said County Court and the Board of Directors of the Pacific Railroad Company, such conditions to be binding upon the parties, but shall not impair or effect the validity of the bonds after they are issued.

Sec. 2d. The "Fund Commissioner" of the Pacific Railroad, or such person as may, at any time thereafter, have the custody of the funds of said Railroad Company, shall, every month after said bonds are issued, pay unto the County Treasurer of St. Louis county, out of the earnings of said Pacific Railroad, $4,000, and $1,000 additional in each month of December, to meet the interest on said 700 bonds, said payments to continue until said bonds are paid off by the Pacific Railroad."

It will be noted that, while the draft of the bill provides

for the payment by the Fund Commissioner, the act adds, "*or such person as may at any time hereafter have the custody of the funds of said Railroad Company.*"

This act was accepted by the County; the company's acceptance was notified to the Secretary of State; the bonds were issued, and with the means thus provided by the County, the company was enabled, within a year, to complete this great enterprise, and render it of great value to the State as well as to itself.

The interest, as provided by the act, was regularly paid by the Fund Commissioner, up to 1868, out of the income derived from the road.

We do not rest the right of the County to an equitable lien, on the mere ground that by its means the road was made valuable. By the civil law, those whose money has been laid out on the improvement of an estate has a privilege upon those improvements as upon a purchase with their own money. (Domat.) We rest on the doctrine, asserted by Judge DILLON, "that the effect of the act of 1865, when accepted and acted upon by the County and company was simply this: Before this the State had a complete and perfect lien upon, and right to receive, all the earnings of the company; it impliedly consented to waive its lien and right to receive these earnings in favor of the County, to the extent of $700,000; and the County was, *pro tanto*, substituted as to the $49,000 per year in the place of the State, with a lien or charge to that extent, as effectual as the State before possessed."

As respects the company the effect of their acceptance of the act and the issue of the bonds under it was to convert the provisions of the 2d section into a contract by which the company consented that the Fund Commissioner, who had a right to receive all its funds, or any other person who

should, at any time thereafter, have the custody of its funds, should every month pay, out of the earnings of the road, the specified sum necessary to meet the interest on the bonds, which payment, it was provided, should continue until the said bonds were fully paid by the Railroad Company.

The State, we maintain, was bound by the contract equally with the company, and could not withdraw the power conferred upon the Fund Commissioner, without a violation of good faith, any more than could an individual substituted in the place of the State.

It is well settled that if a debtor, by a concluded agreement with a creditor sets apart a specific amount of a specific fund in the hands, or to come into the hands of another, from a designated source, and directs such person to pay it to the creditor, which he assumes to do, this is a specific appropriation, binding upon the parties and upon all persons, with notice, who subsequently claim an interest in the fund under the debtor.

Any order, writing, or act which makes an appropriation of a fund amounts to an equitable assignment.

Spain vs. *Hamilton*, 1 Wall., 624;
Christmas vs. *Russell*, 14 Wall., 84.

As this is the pivotal question in the case, we may refer to a few of the well considered decisions in support of the doctrine.

In *Pirch* vs. *Anthony*, 8 Allen, 539, it is thus held by BIGELOW, C. J.: "It is well stated that a party may, by express agreement, create a charge or claim in the nature of a lien on real as well as on personal property of which he is the owner or in possession, and that equity will establish and enforce such charge or claim, not only against the party who stipulated to give it, but also against third persons who are either volunteers, or who take the estate on which the lien is agreed to be given with notice of the stipulation.

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Such agreement raises a trust which binds the estate to which it relates, and all who take title thereto with notice of such trust can be compelled in equity to fulfill it."

This proposition is stated by STORY in very much the same words: "Indeed, (says he,) there is generally no difficulty in equity in establishing a lien, not only on real estate, but on personal property, or on money in the hands of a third person, wherever that is a matter of agreement, at least against the party himself, and third persons who are volunteers or have notice; for it is a general principle in equity that as against the party himself, and any claiming under him voluntarily or with notice, such an agreement raises a trust."

2 Story Eq., § 1231.

In both of these citations, *Legard* vs. *Hodges* is referred to, decided by Lord Chancellor THURLOW in 1792, in which he holds it to be a maxim of universal application "that wherever persons agree concerning any particular subject, that in a court of equity as against the party himself and any claiming under him, voluntarily or with notice, raises a trust."

1 Ves., Jr., 478.

A trust is an equitable right, title or interest in property, real or personal, distinct from the legal ownership. The owner holds dominion over the property, but the income, profits or benefits thereof belong wholly or in part to others. Three things are necessary to constitute it—sufficient words to raise it, a definite subject, an ascertained object.

The jurisdiction to enforce it is not dependent upon, or affected by the form or character of the instrument. The court looks to the substance of the transaction and the primary object of the parties.

2 Story's Eq., § 715, 964.

To the same effect is the doctrine that a mortgage may

arise in equity without any deed or express contract for that purpose.

4 Kent's Com., 154.

Whatever the form of the contract—if it is intended to create a security—it is an equitable mortgage. It is not even necessary that the contract should be in express terms a security; for equity will often imply this from the nature of the transaction between the parties.

Jones on Mortg., § 162.

So an assignment of rents and profits amounts to an equitable lien which would entitle the party in equity to insist upon a mortgage.

Lord Thurlow in *Ex parte* Wills, 1 Ves. Jr., 162.

Again it is said in the case of *Strand Music Hall:* "When the court is satisfied that it was intended to create a charge, and that the parties who intended it had the power to do so, it will give effect to the intention, notwithstanding any mistake which may have occurred in the attempt to effect it.

3 DeG., J. & S., 147, 158.

We deem it unnecessary to cite but one other case referred to in the opinion of Judge DILLON, in which it is held by Lord THURLOW, "that where parties come to an agreement as to the produce of land, the land itself will be affected by the agreement, and equity will specifically enforce it against the party who makes it and all persons with notice."

Legard vs. *Hodges*, 3 Brown Chan., 531;
Legard vs. *Hodges*, 4 Brown Chan., 421.

The decision of Judge DILLON in this case is transferred into the late work of *Jones on Rail Road Securites*, with the remark that this "is the accepted doctrine in Courts of Equity." § 76.

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In an elaborate Brief filed in the court below, for the respondents, the cases of—

Hunt vs. *Rousmanier*, 5 Cond., 408,

Webb vs. *Walker*, 7 Cush., 50,

Rodger vs. *Hosach*, 18 Wend., 320,

are cited as in conflict with the proposition we have stated.

A very brief examination will show that they are in entire harmony with all the decisions relied on by us.

In the two first the question arose on a power of attorney. In Hunt's case the opinion opens with the statement that the "instrument contains no word of conveyance." If, say the court, the word "interest" indicated a title to the *proceeds of sale*, and not a title to the thing to be sold, then the power to sell for his own benefit would be a power coupled with an interest. Such a power would survive the person giving it and would be executed after his death.

But, on the power in question, the court held that it was a mere naked power not coupled with an interest, and though irrevocable by Rousmanier himself, expired on his death.

So in the case of *Webb* vs. *Walker*, it is said the instrument "only gives a power to sell and apply the proceeds. This is not a power coupled with an interest and amounting to an assignment." But, say the court, "when the party has conveyed an interest in the thing itself with a power to sell and appropriate the proceeds, the grantee takes something more than a naked revocable power."

The case of *Hunt* vs. *Rousmanier*, is cited as sustaining the decision.

In *Rodgers* vs. *Hosack*, Gracie & Sons assigned, for benefit of creditors, a claim against the *British Government*, with a covenant by A. Gracie, that if this should be insufficient, "the deficiency should be paid out of any monies received by *him*, his executors, &c., from the *French Government*, as soon as the same shall be received by him.

After A. Gracie's death the French Government agreed to pay $——— to his executors. Thereupon a creditor filed his bill to enjoin the executor from receiving the same.

COWEN, J., held: "Here is no assignment, no mortgage, or pledge, no order, or any other specific appropriation of the French funds, but a *mere covenant* to pay them over on their being obtained by the covenantor." Such an agreement does not create a lien either at law or in equity. 335.

DICKINSON, J., fully approves the decision in *Bradley* vs. *Root*, 5 Paige, 641, and cites *Yates* vs. *Groves*, 1 Ves., Jr., and other cases, as fully establishing that an order to pay a debt out of a particular fund constituted an equitable assignment and gave to the creditor a specific lien. Indeed (says the judge), this is established as to orders, beyond controversy. But it requires little discrimination to discover the difference between an order which both in terms and legal effect contains an assignment or the elements of one, being a direction to one to pay or deliver with power to the other to receive and appropriate; *and a simple naked covenant or agreement* to pay out of a particular fund, unaccompanied by any words of transfer, or any power or authority whatever in the premises.

In *Bradley's case*, referred to by Dickinson, J., the agreement was between Stewart, mail contractor, and Bradley, that he would faithfully carry the mail according to Stewart's contract, and receive from the Postmaster General all monies due therefor, and that Stewart would deliver to him all monies and drafts received from the Postmaster by virtue of his contract.

The assignment of the mail contract by Stewart to Bradley was never made known to the Department.

The Court held that in Equity this was clearly an assignment of the contract and of the specific fund which was *to become payable* from the Postmaster General by virtue of

said mail contract, citing Lord Thurlow, in *Yates* vs. *Groves*, 1 Ves., Jr., that "an order to pay a debt out of a particular fund constituted an equitable assignment of the fund *pro tanto*, and gave to the creditor a specific equitable lien thereon, although the order had not been accepted by the holders of the fund before the debtor's bankruptcy."

The bonds of the County were issued to the Company under resolution of 18th January, 1865, in three different lots—to wit, on 20th February, 7th March, and 5th May, 1865.

Prior to any issue, the Company had accepted the provisions of the Act of 7th January, 1865.

It was contended in the court below that the circumstances transpiring subsequent to the date of the Act, and prior to the delivery of the bonds, were inconsistent with the claim of the county for a lien.

These are set forth in the findings from, p. 66 to p. 73, and consist of certain proceedings by the county and the Company, not material to be considered, and include two legal opinions as to the effect of the Act of 1865—one by Mr. Leighton, dated 10th January, 1865, and addressed to the President of the Railroad, which the Master finds was presented to the County Court "apparently drawn up with the view to influence the Judge of the County Court in the premises."

The other opinion was by Mr. Clover, the County Counsellor, and was addressed to John H. Fisse, chairman of the County Court.

Mr. Leighton's opinion is furnished to the President in reply to his communication "touching the construction and effect of the act of 1865." p. 66.

It is so compact an argument to show that an "equitable lien, or charge upon the earnings," would be created if the Company should accept the act, and the County should make

the loan, that any extract from it would mar it, in its completeness. The act says he "*admits of no other construction.*"

It is said, however, that the opinion of the Corporation Attorney, Mr. Clover, was adverse to the county lien.

This opinion was given in answer to the inquiry whether, under the 2d section of the act, "the payments therein fixed are secured to the county beyond all contingencies, until such time as the bonds themselves were paid by the Pacific Railroad Company."

Mr. Clover was of the opinion that these payments were "not secured to the county beyond all contingencies," and he bases this opinion not on the relation the company bore to the county, as affecting the question of lien, but whether the county obtained a security beyond contingency as against the State, and those who, under the act of 1864, had loaned their credit. He says: "Can the Legislature divert this fund, or any portion of it, to the security of subsequent creditors, who contract with the knowledge that the security, which they accept, has been already pledged to another? *That is the question.*"

It may be remarked here, that the difficulty suggested by the question raised by Mr. Clover does not now exist, as the liens referred to by him have long since been extinguished, and we are now only to deal with mortgages executed subsequently to the act of 1865.

But, if Mr. Clover's opinion had directly denied the lien of the county, as against the company, and we were left to speculate as to whether the county believed they had, or had not, a lien when they resolved to issue the bonds, surely the argument submitted in behalf of the company to the county, asserting, in the most positive terms, that if the county should issue the bonds, they would have a lien under the act of 1865, coming, as it did, from the party to be bound by the lien, was one the county would most likely adopt.

It is true the county had an interest in the completion of the road; but they had a still larger interest in obtaining security for their loan; and if the party to be bound by the lien admitted that such security existed, the county could safely rely upon an admission which secured both interests.

If the county had an equitable lien at the time the bonds were issued, did they loose it by any acts which subsequently occurred?

The following are the matters relied on by respondent as showing the county never had a lien, or, if they had, they had lost it by their conduct. See p. 73:

1st. In 1866 the company issued a financial statement of their indebtedness, in which it is stated that the bonds of the county, issued under the act of 1865, had no lien on the road. The volume in which this is published contained a copy of this act and the order of the county court for the issue of the bonds.

2d. In 1867 the presiding justice was ordered to cast the vote of the county for those opposed to a sale, unless the interest of the county was protected by the terms of sale. A vote for directors was also made in 1868.

3d. The mortgage of July, 1868, to raise the means for the release of the State's interest under the act of 1868, recites that the State is the holder of first lien subject to the Dresden mortgage.

4th. The mortgage of July, 1871, recites that it is a ~~secured~~ Second lien.

5th. On 10th July, 1875, the company executed the so-called third mortgage, being the one now in controversy.

6th. 1st November, 1875, proceedings in bankruptcy were instituted by the county against the company.

This is substantially all the evidence in the cause upon which the court will be asked to say that the decree affirming the lien of the county should be reversed.

The county was a stockholder in the company, and continued to be so until November, 1869, when it sold its stock. By the act of 1859 it was required to cast its vote for directors. p. 61.

The 37th finding is that "it does not appear that the county, while it was a stockholder, actively participated in the business proceedings of the company or was represented in its affairs."

The only mortgage made while it was a stockholder is that of 1868, executed under the provisions of the act of that year, which repeatedly recognizes the loans of the county as made under the act of 1865, and provides for the assumption of its payment by the purchaser in case of sale.

This is the first mortgage under which the Trustees, in July, 1873, filed a bill to enjoin the Governor of the State from selling the Road under a lien claimed by the State still to subsist in its behalf. In this bill is the statement, "They (the complainants) say that the Road was finally put in running order to the western boundary of the State in 1866; but the Dresden Bonds, together *with the loan of the County credit* as aforesaid, proved insufficient to pay for such extension, and for the repairs and equipments rendered necessary by the circumstances herein stated; and at the time of the completion of the Road, there remained due by the Company a large floating debt, which, in Equity and good conscience, together with the loan by St. Louis County, possessed claim for payment *not inferior to those possessed by the State, under its statutory mortgage.*" (*p.* 76.)

No sale took place under the act of 1868, the company

having complied with the terms of the act in paying the amount claimed by the State as the consideration for executing its release of all its title and interest.

This release by the State could in no wise affect the "title and interest" of the county. If it had a lien prior to the act of 1868, it remained intact. There is nothing in the act if the State had the power to impair the lien to show that such was the intention of the Legislature to disturb it. On the contrary the intention is shown to preserve it.

We submit that the recital made by the company in its statement of 1866, and that made in the mortgage of 1868, while if made in good faith, might show what the company believed to be the nature of the agreement with the county, cannot change the legal character of that agreement or estop the county from asserting it.

The direction in 1867 to vote for directors opposed to a sale, unless the interest of the county was protected by the terms of the sale, was but the use of the same abundant caution employed by the act of 1868, which required that whoever might become the purchaser should assume the obligation to the county.

Then as to the proceeding in Bankruptcy.

On 21st October, 1875, the interest being unpaid, a committee was appointed by the County Court to confer with their counsel, and cause to be instituted such proceedings against the company as might be necessary to protect the interests of the county.

On the 28th October of same year a petition in bankruptcy was filed by the county, in which it is stated that its demand—provable—constituted one-third of the unsecured debts provable against the company. The petition set forth fully the nature of the county's demand under the act of 1865.

The petition was verified by Reichtein, treasurer, and Shultz, presiding justice of the county. The road made answer, denying its liability to be declared bankrupt. On 10th May, 1876, it was referred to the Register, to ascertain whether the petitioner represented a sufficient amount of indebtedness; whereupon and on the same day *the attorney of the county dismissed the petition.*

If this petition was filed on the assumption that the monthly interests were unsecured, the discovery of this error most probably led to the withdrawal of the proceeding before action by the Court.

In estimating the weight of this as an admission, we must remember that it was made ten years after the agreement of loan was made, and that none of those who represented the county at that time were in office when these proceedings were instituted.

Beyond this is the fact that they were instituted four months *subsequent* to the execution of the third mortgage now in controversy, and, therefore, could have had no influence upon ~~their~~ execution.

If, as is contended, the county had no security for the monthly payments provided by the act, there is little or no significance in the stipulation to that effect.

The act and the agreement under it was at a time when the State was in possession of all the revenues of the road administered by its Fund commissioner.

As we have seen, the Board adopted the draft of a bill in anticipation of making the loan, in which it was provided that these monthly payments out of the earnings of the road should be made by the Fund Commissioner.

The Legislature, foreseeing that, under certain conditions, the functions of that officer might expire, carefully provides

in the act that the payments shall be made by the "Fund Commissioner of the Pacific Railroad, *or such person as may at any time hereafter have the custody of the funds of said Railroad Company.*"

The appropriation thus made by the State and company was of an interest which could, in case of default, be enforced by mandamus.

It is also to be remembered that, at the date of this transaction, the road was in a ruinous condition, and without credit.

Was, then, this large loan made without security?

We cannot better answer than by adopting the language of Judge DILLON (hazarding a little repetition):

"It was not a donation by the county. It was not a purchase by the county of the stock of the road. The act only authorized the county to loan its credit, or bonds, to the company. The company, as we have seen, was in no condition to meet the interest on the bonds unless the provisions in the act of 1864, for the sequestration of its revenue by the State, and for the benefit of the State, were modified. Hence, we see the object and necessity for the 2d section of the act of 1865. It can hardly be supposed that the county would loan this large sum to a company whose property was already mortgaged to the extent of near or over ten millions of dollars, including unpaid interest, and all whose revenues were appropriated, and actually going into possession of the State, and were to continue to go there until the large debt of the State was paid.

"Now, the effect of the 2d section of the act, when accepted and acted upon by the county and company, was simply this: Before this, the State had a complete and perfect lien upon, and right to receive, all the earnings of the company; it impliedly consented to waive its lien and right to receive all the earnings, in favor of the county, to the extent of

$700,000; and the county was, *pro tanto*, substituted as to the $49,000 per year in place of the State, with a lien or charge to that extent, as effectual as the State before possessed. Why is this not the effect of what was done?"

It is contended (continues the judge) that the effect of 1868 in closing its relations with the company as creditor, and thereby abolishing the office of Fund Commissioner, terminated any trust which the 2nd section may have created in favor of the county.

But there is a satisfactory answer to that position even if the legislative power over the rights of the county be as absolute and unlimited as claimed by counsel. The legislation of 1868, so far from evincing an intention to impair or destroy the rights of the county, whenever it made any provision in that regard. it was one recognizing and intended to secure and protect those rights.

Besides, the contingency of the repeal of the office of Fund Commissioner was anticipated in the 2nd section, and provision was made that in that event the duty which before had devolved on that officer, should *ipso facto* devolve upon such person as might at any time thereafter have the custody of the funds of the rail road company."

Estoppel.

It is submitted that if the loan, under the act of 1865, created a lien, there has been nothing in the acts committed or omitted by the county that now estops the assertion of it.

An estoppel *in pais* (say the court in *Henshaw* vs. *Bissell*) is sometimes said to be a moral question. Certain it is that to the enforcement of an estoppel of this character, such as will prevent a party from asserting his legal rights to property, there must generally be some degree of turpitude in his conduct which has misled others to their injury. Conduct or declarations founded upon ignorance of one's rights,

have no such ingredient, and seldom work any such result. There are cases, it is true, where declarations may be made under such peculiar circumstances that the party will be estopped from denying any knowledge of his rights; but these are exceptional and do not affect the correctness of the general rule as stated.

18 Wall., 271.

This case is cited in *Brant* vs. *Virginia*, in which the court hold with STORY, that in all this class of cases the doctrine proceeds upon the ground of constructive fraud or gross negligence, which in effect implies fraud. And, therefore, when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief.

93 U. S., 335.

1 Story's Eq., § 390–391.

This doctrine should necessarily receive further modification when applied to public corporations, for they cannot bind the corporators by any act beyond the scope of its powers or entirely foreign to the purposes of the corporation. This grows out of the nature of such institutions. The inhabitants are the corporators, the officers are but public agents of the corporation.

Dillon, § 381.

The power was here conferred upon the county judges to issue bonds without the consent of the corporators who were liable to pay them. If our construction be the true one, that the exercise of that power created a contract statutable in its origin and equitable in its nature, we might well contend that these county officials could not by an express contract release the company from this lien while leaving their constituency, the corporators, subject to the payment of the bonds.

And it would seem to follow that what could not be effected by express contract could not be, by acts of omission or acquiesence.

But the exigency of this case does not require a further elaboration of this proposition, for it is sufficient to say that there is no warrant to charge the county as guilty of any express or constructive fraud.

It is not pretended that those who dealt in the bonds of the company were influenced by anything done or said by the county. The 32d finding is: "They seem to have derived their information from statements of parties representing the rail road company, from general reports, and the general understanding amoag men dealing in these securities. Bridge, Brown & Poor's Railway Manual were mentioned by the witnesses as the sources from which they derived their information." p. 77.

Notice of Lien.

If we have established that the county had a lien, the question remains, Had the subsequent incumbrancers notice thereof?

The act of 1865 is a public act. It conferred an important power upon a public political corporation, for a public purpose of great interest to the State and all its inhabitants, and charged a public officer holding the road for the benefit of the State how to dispose of its revenues. Such an act the court would take judicial notice of without proof, and all persons are bound by notice of its contents.

This act is recited in that of 1868, entitled "An act for the sale of the Pacific Railroad, and to foreclose the State's lien thereon and to amend the charter thereof."

Great stress was laid on the argument in the Court below, to show that the act of 1865 is a private act, and, though recited in the act of 1868, admitted to be a public

act, it did not operate as notice to the subsequent incumbrancers.

Admitting that a private act does not bind or include strangers, in interest, to its provisions, and that they are not bound to take notice of it, even though there be no general saving clause of the rights of third persons, we insist that the act of 1865 contains all the elements of a public act.

"It is sometimes difficult (says Kent) to draw the line between a public and a private act, for statutes frequently relate to matters and things that are partly public and partly private. Generally speaking, statutes are public; and a private statute may rather be considered as an exception to the general rule. It operates upon a particular thing or private person."

1 Kent, 459.

SEDWICK, after stating the distinction which obtains in England, says: "In this country the disposition has been to enlarge the limits of the class of public acts, and so it has been held that the establishment of towns and counties and their boundaries, court-houses, jails, bridges and ferries, and all matters of public policy and acts relating to them are, of course, public acts."

Referring to the decisions of this court, we find that as early as 1803, it was held that the statute of Virginia, incorporating the Bank of Alexandria, was a public act.

Young vs. *B'k Alexandria*, 4 Cr., 384.

In 1862, it was said by the court that if the pleadings permitted it, they would take judicial notice of the acts of California relating to the harbor of San Francisco, and particularly of the water-lot act of 1851.

Griffin vs. *Gibb*, 2 Bl., 523.

If, ~~then,~~ we were to admit that the act of 1865 is a priuate act, still its recital in the act of 1868, and the careful

provisions made in that act for securing the loan of the County, would alone be sufficient to charge with notice all persons dealing with the road for subsequent security.

Earnings may be Mortgaged.

There remains but one other objection, taken in the court below, and this relates to the assignment of the earnings of the road to pay the interest.

It would seem to be undoubted that the owner of property may make such disposition of it, or of its proceeds, in rents and earnings, present or future, as he may think proper, with the single limitation that such disposition is not in derogation of law; and this rule is as applicable to corporations as to individuals.

As to future acquisitions, STORY, J., after a full examination of the cases says: "The clear result of all the authorities is, that wherever the parties, by their contract, intended to create a positive lien, or charge, either upon real or personal property, whether then owned by the assignor or not; or, if personal property, whether it is then *in esse*, or not, it attaches in equity, as a lien or charge upon the particular property, as soon as the assignor or contractor acquires title thereto against the latter, and all persons asserting a claim thereto under him, either voluntary, or with notice or in bankruptcy."

Mitchell vs. *Winslow*, 2 Story, 230.

Equity follows the doctrine of the civil law: *Quod emptionem venditionem que recipit, etiam pignorationem recipere potest.* Therefore, rights in remainder and reversion, possibilities coupled with an interest, rents, franchise and choses in action, are capable of being mortgaged.

2 Story's Eq., § 1021.

Thus the owner of land may mortgage the crops to be

thereafter grown upon it, the rule being general, that a thing which has a potential existence may be mortgaged.

The subject is considered by this court in *Pennock* vs. *Coe*, and the conclusion thus stated: "The enquiry is not whether a person can grant in present, property not belonging to him and not in existence, but whether the law will permit the grant or conveyance to take effect upon the property when it is brought into existence and belongs to the grantor, in fulfillment of an express agreement founded on a good and valuable consideration, and this when no rule of law is violated, or rights of a third party prejudiced."

24 How., 124.

Several cases have been before this Court involving mortgages of the earnings of the Road, and no point has heretofore been made as to the legality of such conveyances.

In the late case of *Gilman* vs. *Ill. & Miss. Tel. Co.*, it was asserted, on the one side, that the Company had legal capacity to mortgage its future earnings; on the other side, this was admitted—the only contention being that, when the right to earnings depends upon a contract which provides the mode in which they shall be received and applied, that mode must be pursued.

91 U. S., 609.

It is unnecessary to explore at length the law of mortgage as applied to Rail Road Corporations. This is done in the late work of "Jones on Rail Road Securities," 114 to 120.

It is sufficient, as we are dealing with a corporation of Missouri, to say that, by a general law of that State, every Rail Company is empowered to borrow money for completing or operating their road, and "to mortgage its property and franchises to secure the payment of any debt contracted for the purpose."

1 Wagner's Statutes, 1872, p. 298.

But beyond this, the agreement under consideration *has the sanction of a special act of legislation.*

The State having authorized it, the company having assented to it, and no other interest in existence when the agreement was entered into, the question of a want of corporate power has no ground to rest on.

We have here the agreement of a corporation whose road extended 300 miles, representing an immense capital, appropriating the comparatively small sum of $49,000 per annum out of its earnings to pay the interest on a loan made to it.

Independent of any special statutory sanction, such an agreement by the company would seem to be unassailable.

We submit, then, that the following propositions are well established:

First. That the act of 1865, and the action of the county and company under it, created a lien in favor of the county.

Second. That the appellants had notice of it, and are bound by it.

Third. That nothing is shown in the record which estops the county from asserting it.

The decree of Judge Dillon should, therefore, be affirmed.

P. PHILLIPS,
for Def'ts in Error.

Supreme Court of the United States.

OCTOBER TERM, 1879.

GEORGE E. KETCHUM, A CITIZEN OF THE STATE OF NEW YORK,
Plaintiff,

vs.

THE PACIFIC RAILROAD, THE ATLANTIC & PACIFIC RAILROAD, A CORPORATION CREATED BY ACT OF CONGRESS, APPROVED JULY 27, 1866, AND OTHERS,
Defendants.

No. 162.

PETITION OF INTERVENOR, in the above suit by the COUNTY OF ST. LOUIS, filed the 20th of April, 1876, for an equitable and statutory lien, for $700,000 bonds, loaned the Pacific Railroad by said County, under an Act of the General Assembly of Missouri, approved January 7, 1865.

This lien of the COUNTY OF ST. LOUIS, was transferred to the CITY OF ST. LOUIS, in December, 1877, by force of the scheme and charter.

STATEMENT AND BRIEF BY BRITTON A. HILL, OF COUNSEL FOR THE COUNTY OF ST. LOUIS AND THE CITY OF ST. LOUIS.

Maynard & Tedford, Printers, 207 N. Third St.

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Defendants.

No. 162.

Bill for foreclosure of mortgage on Pacific Railroad filed November 11, 1875, the Atlantic & Pacific Railroad Company being the lessee of the Pacific Railroad for 999 years.

PETITION OF INTERVENOR, in the above suit by the COUNTY OF ST. LOUIS, filed the 20th of April, 1876, for an equitable and statutory lien, for $700,000 bonds, loaned the Pacific Railroad by said County, under an Act of the General Assembly of Missouri, approved January 7, 1865.

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STATEMENT.

The "Pacific Railroad" obtained a charter by an act of the Missouri General Assembly in 1849, to build a railroad from St. Louis, westward. Laws of Mo. 1849, p. 219. The State reserved the right to purchase said railroad at the end of fifty years.

This act was amended by an act of March 1st, 1851, making the charter *perpetual*, (§6) and authorizing the company to construct a railroad from the Mississippi river at the City of St. Louis, to any point in the western line of the State. Laws of Mo. 1851, 268 §9.

This act was further amended on the 24th of February 1853, by an act authorizing the Pacific Railroad Company to extend, construct, maintain and operate their railroad to *any point or points* west of the boundary of this State, and enter into contracts for that purpose. Laws of Mo. 1853.

The act of February 22, 1851. Laws of Mo. p. 265, authorized the issue of $2,000,000 dollars of State bonds, having 20 years to run at six per cent. with semi-annual coupons attached, to be loaned to the Pacific *Railroad*, to aid in its construction. The bonds to be payable to the order of the Pacific Railroad, and endorsed by it on the sale of the bonds, binding the company to pay the bonds and the coupons at maturity. By §4 of this act, the State is declared to have a "mortgage of the road of the company, * * * * and every part and section thereof, and its appurtenances, to the people of the State, for securing the payment of the principal and interest of the sums of money for which such bonds shall, from time to time, be issued and accepted, as aforesaid."

By §9, of this act, as a further condition of said loan of state bonds, the Pacific Railroad binds itself for the punctual redemption of the bonds and payment of the interest thereon; and the more fully to secure the payment of the interest, the *tolls and income* of the Railroad are pledged to the state.

By § 11, of this act, if the company make default in the payment of the principal or interest on said bonds, the Governor may advertise and sell the road and appurtenances at auction, with power to buy in the same for the use and benefit of the State.

By the acts of 22d. February, 1852 p. 263—25th. Dec. 1852 p. 263—3d. Mar. 1855 p. —10th Dec. 1855 p. 472 —12th Dec. 1855, p. 484—3d. Mar. 1857 p. 85 and 19th Nov. 1857 p. 59; the total amount of bonds to be loaned by the State to the Pacific Rialroad, was $11,050,000.

For all these bonds so to be loaned to the Pacific Railroad, the State had a first lien upon the Railroad, its appurtenances and also the *tolls* and *income* of the Railroad.

By § 12 of act of Dec. 10th, 1855, Mo. Laws p. 472, the State created a Board of Public Works, consisting of three members, whose duty it was to inquire into the management

and construction of all the Railroads in Missouri—and superintend all the expenditures of the companies.

By § 28 of the same act, the State declared its sovereign power to take control of and manage the Railroad in case of non-compliance with conditions, in these words:

"§ 28. In case the Pacific Railroad fails to complete the said first division of said Southwest branch, in three years after the passage of this act, or to pay the interest on said guaranteed bonds, or to hold the State harmless from said guaranty, then and in that case, the said Southwest branch Railroad, the lands appropriated to the construction thereof, belonging to the Railroad Company at the time of such default, and all appurtenances and franchises shall at once by operation of law, and without any process or proceeding, become the property of the State, subject only to the aforesaid mortgage. And the Governor of this State, upon the failure of said company to perform all or either of the above conditions, may take possession thereof in behalf of the State, and manage and control the same until otherwise disposed of by act of the Legislature."

§ 27, of the same act, referring to the preceding section four, shows that the Southwest branch of the Pacific Railroad was then merely an appurtenance of the original Pacific Railroad.

§ 29, of the same act, only requires the Pacific Railroad, Hannibal & St. Joseph, North Missouri, and Iron Mountain Railroad companies, to accept the provisions of the act within six months after its passage.

The sovereign power of the State, as declared in § 28, to take possession and manage and control the Railroad on certain conditions, applies to the Pacific Railroad and its Southwest branch. See, also §§ 20, 21 of the same act, which declare the Southwest branch to belong to the Pacific Railroad. § 22 directs the Pacific Railroad to sell the

bonds of a ten million dollars loan and to use the proceeds in the construction of its Southwest branch.

The exercise of the sovereign power of the State is recognized and authorized by § 4, of Mo. act of 1857, pp. 86-7; § 5, *id.*; § 6, *id.*

By § 2, of the act of March 5, 1859, Mo. Laws of 1859, pp. 63-4; the Commissioners of the State interest fund, were authorized to inspect the books and papers of the company and treasury, and to require the proceeds of the bonds issued by the State, "to be faithfully applied to the actual construction of the Southwest branch of the Pacific Railroad."

§ 8, of this act, required the Pacific Railroad Company, to accept these conditions, within thirty days after the passage of the act.

§ 3, of the act of March 2, 1861, declares the forfeiture to the State of all the lands, appurtenances and franchises of the Southwest branch Railroad, if the Pacific Railroad Company fail to pay the interest and principal of the guaranteed bonds, exchanged for the State bonds, under this act, as the same may fall due.

§ 4 declares this act shall not release said Pacific Railroad from any forfeiture, penalty or restriction whatever; and requires the Board of Directors of the Pacific Railroad Company, to accept the provisions of this act under the corporate seal of the company.

The exercise of the sovereign power of the State over the Pacific Railroad and its Southwest branch, is shown by all the preceding acts of the General Assembly. The first lien of the State upon the Pacific Railroad, its franchises, appurtenances, tolls and earnings, with the right of forfeiture to the State, clearly appears through all the legislation concerning the Pacific Railroad Company.

By the act of the 10th February 1864, Laws of Mo. p. 50, § 1; the State authorized the Pacific Railroad Company

to issue 1,500 bonds of $1,000 each at 7 per centum interest per annum, having 4, 5, and 6 years to run, to be secured by a first mortgage on the road west of Dresden, and as much of the proceeds of said bonds, as may be necessary, shall be applied to the completion of the road from its present terminus to Kansas City, and to no other purpose; said bonds only to be *negotiated or sold, as the money* is required for the payment of work done or under contract, * * * and the act declares, that "for this object and to this amount and extent only, (the State) hereby relinquishes her first lien and mortgage and right of forfeiture upon said road west of Dresden."

The first section of this act forbids any sale under the Dresden mortgage, until twelve months after notice of the failure of the company to pay interest or principal has been given to the Governor and Secretary of State; and the State had the right to redeem the said mortgage or buy in the same at any sale thereunder, and if the State paid or tendered payment of the amount of said mortgage with interest, "all the rights and privileges of the Pacific Railroad Company in and to said railroad, depots, lands, rolling stock, machine shops and other appurtenances, *shall be vested in the State*, and the Governor of the State shall take possession of the said road, without any suit or sale."

The exercise of the soverign power by the State is plainly asserted in this first section of the act, and § 2 creates the office of Fund Commissioner to continue until the $1,500,000 Dresden bonds and the State bonds loaned to said Railroad Company with interest thereon, are fully paid *out of the earnings* or exchanged for the first mortgage bonds *of said road*. These were never issued.

§ 3 grants to the Fund Commissioner full power to act in like manner as a receiver acts in chancery proceedings to foreclose a mortgage on a Railroad. This Commissioner is to receive the said Dresden bonds from the Pacific Railroad

Company; sell them and deposit the proceeds in the Boatmen's Savings Bank at St. Louis, subject to his own draft for the completion and equipment of the road; such drafts to be endorsed by the Governor. "All gross earnings of said "road, from all sources, shall be paid in daily to said Fund "Commissioner and all other sources of revenue, belonging "to or connected with said Railroad, shall be under his con-"trol, and be taken into his possession as they arise, and be "deposited daily in the said bank." * * *

§4. Directs the said Fund Commissioner to use the moneys arising from the sale of said bonds, to pay for the construction of the extension and equipment of said road, as aforesaid, and out of the gross earnings of the Railroad, he shall pay for building the road and operating it.

§7. Directs the Fund Commissioner to apply the net earnings of the road to the payment of his own salary, the payment of interest on bonds, dividends on preferred stock, and the surplus, if any, to the purchase of the outstanding State bonds, with the coupons thereon. He is empowered to examine the books, papers and accounts of the road and insist upon the payment of the gross receipts of said road over to him.

§9. Requires all pay rolls to be made out monthly, with proper vouchers for the Commissioner; monthly reports of the condition of the roads, with a full statement of the business of the same, for the Governor; and any outlay deemed necessary, beyond and outside of the actual operating expenses, * * shall be first approved by the Governor and Chief Engineer, before the same shall be paid by the Fund Commissioner. The State had thus guarded its interests in the Pacific Railroad, by preserving its first lien for over $7,000,000 on the Railroad from St. Louis to Dresden, and its tolls and income. This first lien was surrendered by the State, in favor of the Dresden bonds and mortgage of the railroad west of Dresden; but on condi-

tion that a Receiver should take all the earnings in gross, examine into all accounts, and pay all interest on bonds, etc. This as well as the preceding acts of the General Assembly of Missouri, had been accepted by the Pacific Railroad Company. In the exercise of its sovereignty the State *had taken possession of the Railroad and all its earnings*, by the agency of this Fund Commissioner, who was directed to act under the advice and direction of the Governor.

We were then in the midst of the war to establish slavery on the free soil of the republic, under the squatter sovereignty act, and the decision in the Dred Scott case. Missouri became a battle ground, and the State in protecting its first lien on the Railroad and its earnings, took possession of the gross earnings of the road and its moneys by an act of sovereignty, and held possession for four years, and then asserted its lien and its right until November, 1874, when this Honorable Court held that the first *lien* of the State on the Pacific Railroad, its appurtenances, tolls and income, could be released by an act of the State Legislature, in violation of an express mandate of the State Constitution of July 4, 1865, Art. II. § 15, as follows: "The General Assembly shall have no power, for any purpose whatever, *to release the lien held by the State* upon any railroad."

The Railroad Ordinances, 1st, 2d, and 3d, being a part of the Constitution of 1865, directed a tax on the Railroad of 10 per cent. up to the first of October, 1868, and 15 per cent. after that date, to be applied in payment of the principal and interest then due, or to become due, on the bonds issued as a loan to the several Railroads in the State of Missouri; and required the Railroad companies to pay the principal and interest on the bonds, until they were fully paid: "but *nothing* shall be *received* by the State in *discharge* of any *amounts due* upon said *bonds*, except *cash* or other *bonds* or obligations of this State."

A few months before the adoption of said Constitution, the act of January 7, 1865, was passed by the General Assembly. Rec. 65, entitled: "An act authorizing the county of St. Louis to issue bonds," which act is in words and figures following, to-wit:

SEC. 1. The county of St. Louis is hereby authorized to issue seven hundred county bonds of the denomination of one thousand dollars each, having twenty years to run, and bearing interest at the rate of seven per cent. per annum, payable semi-annually, the principal and interest payable in the city of New York, and loan said bonds to the Pacific Railroad Company, for the completion of said road; said bonds to be issued under such conditions as may be agreed upon between said county court and the board of directors of the Pacific Railroad Company, such conditions to be binding on the parties, but shall not impair or affect the validity of the bonds after they are issued.

SEC. 2. The Fund Commissioner of the Pacific Railroad, or such person as may at any time hereafter have the custody of the funds of said railroad company shall every month after said bonds are issued, pay into the county treasury of St. Louis county, out of the earnings of said Pacific Railroad, four thousand dollars, and one thousand dollars additional in each month of December, to meet the interest on the said seven hundred bonds; said payments to continue until the said bonds are paid off by the Pacific Railroad.

At the time of the passage of this act, the State was in possession of the Pacific Railroad by its Receiver subject to the orders of the Governor, and entitled to receive all the earnings and moneys of the road. The §2 is the command of the sovereign in possession that its *own* Receiver, shall pay into the County treasury of St. Louis County, every month after said bonds are issued, *out of the earnings* of said Pacific Railroad, $4,000, and $1,000 additional in each month of December, to meet the interest on 700 bonds of $1,000 each, said payments to continue until said bonds are paid off by the Pacific Railroad.

Prior to the passage of the act of January 7th, 1865, McPherson, Bridge & Meier, a committee of the board of directors of the Pacific Railroad, presented to the County Court of St. Louis County, a petition, describing the destruction of the property of the Pacific Railroad by the

burning of bridges, depots and machine shops, and the destruction of the railway track between St. Louis and Tipton during Gen. Price's raid into the central portions of Missouri in September, 1864; and they asked the County Court to loan the Pacific Railroad $700,000 in County bonds having twenty years to run, bearing semi-annual coupons for seven per cent. per annum interest; the company to refund to the county the principal and interest as the same matures. (Rec. p. 62.)

The County Court on the 29th of December, 1864, passed a resolution to loan the $700,000 in county bonds to the Pacific Railroad Company, if the State would enact a law, commanding the Fund Commissioner to pay into the County treasury, every month, out of the earnings of the Pacific railroad $4,000 and $1,000 additional in each month of December, to meet the interest on said 700 bonds. (Rec. p. 64–5).

The Legislature of Missouri enacted the law of January 7th, 1865, and the attorney of the Pacific Railroad, Geo. E. Leighton, Esq., gave the company an opinion on the 10th of January, 1865, stating the general relations of the parties to the proposed loan of the County bonds to the company. He appears to be the only counsellor consulted at that time, who comprehended the questions at issue. He declares the Fund Commissioner to be a general trustee or Receiver, holding, with the assent of the company, the earnings of the Railroad Company upon express statutory trusts; such as receiving the money on the sale in April, 1864, of the $1,500,000 Dresden bonds, and all the gross earnings of the Railroad. The interest on all descriptions of bonds, the running expenses and the cost of the construction of the Railroad, were to be paid by said Receiver, and hence Colonel Leighton suggests that the agreement proposed between the company and the County could not be carried into effect, because the act of February 10th,

1864, places all the earnings of the Pacific Railroad beyond the control of the company, in the hands of the Fund Commissioner as trustee for the benefit of the State as the *cestui que trust;* he should have said, as the sovereign holding the *first lien* on the *tolls* and *income* of the Pacific Railroad, under the act of 1851, §9, Laws of Missouri, pp. 267, 8, 9, 270, and the act of February 10, 1864, creating a Receiver to take and hold for the State, all the earnings of the road, for the purposes of road construction, paying interest on the State bonds, the Dresden bonds and the running expenses of the road, with the assent of the Pacific Railroad Company.

The lien of the State on the railroad and its appurtenances by § 4 of the act of 1851, and the lien on the *tolls* and *income* by § 9 of same act, were prior to all other liens, and were created by the sovereign power of the General Assembly of the State, in the enactment of that statute, accepted by the company.

The Fund Commissioner, created by the statute of February 10, 1864, was the Receiver of the Railroad, to protect the liens of the State on the road, its appurtenances and the *tolls* and *income*, by taking all the earnings and all the proceeds of the Dresden bonds.

It does not appear from the record whether the proceeds of the $700,000 in County bonds loaned the Company, ever passed into the hands of the Fund Commissioner, but it does appear that the bridges and the track destroyed by the rebels, were rebuilt in the spring of 1865, and the presumption is, that all the proceeds of the County bonds passed into the hands of this Receiver for the State and the Company, and were expended by him in the reconstruction of the railroad and bridges on the Eastern division thereof.

The act of January 7th, 1865, vested in the County of St. Louis, a prior lien to the State, for the principal and

interest of the 700 county bonds loaned to the Railroad Company by virtue of the statute. It was not a waiver or postponement of the interest of the State, *cestui que trust*, in favor of the county, but a new lien, created by the State to secure the payment of the interest and principal of the bonds, loaned by the county to the company. (Rec. p. 66.) The Fund Commissioner was commanded to pay into the County treasury out of the earnings of the Pacific Railroad the interest on said 700 bonds, said payments to continue until said bonds are paid off by the Pacific Railroad.

The State by the act of February 10th, 1864, had given the Dresden bonds priority over the first lien of the State, on the western half of the railroad, and the act of January 7th, 1865, gives the County of St. Louis, a priority over the State lien on the *tolls* and *income* of the road for the whole extent thereof. The County Counsellor was in error in his opinion that no fund was provided for the payment of the principal of the bonds. The act of 1865, makes the lien on the earnings of the Railroad perpetual for the payment of the monthly interest, which shall continue until the bonds are paid off by the Pacific Railroad. (Rec. p. 68.)

The County Court of St. Louis County, on the 18th of January, and the Pacific Railroad on the 19th of January, 1865, accepted the provisions of said act of January 7th, 1865, and all the parties—the State, the Receiver, the County and the Railroad—became bound by the act according to the terms thereof. (Record p. 70.)

The provision in the first section of the act of 1865, that "said bonds to be issued under such conditions as may be agreed upon between said County Court and the Board of Directors of the Pacific Railroad Company, such conditions to be binding on the parties, * * * " does not affect the statutory lien on the earnings given by the State to the county in the second section of the same act. This priority of lien upon the earnings of the Railroad was granted by

the sovereign power of the State, and was to continue until the principal was paid off. (Record p. 65.) This became a vested right on the issue and acceptance of the 700 bonds.

The bonds were issued and delivered by the county of St. Louis and received by the Pacific Railroad in amounts as follows: One hundred bonds on the 20th day of February; two hundred bonds on the 7th day of March and four hundred bonds on the 5th day of May, 1865, which said bonds were afterwards sold by said Pacific Railroad, and the proceeds realized therefrom used in the completion of said Pacific Railroad. (Record p. 72.)

On the 4th day of July, 1865, the new Constitution of Missouri was adopted by a very large majority of the votes of the people and became the organic law of the State. (General Statutes of Mo., 1865, pp. 52-3; Ordinances 1, 2, 3; Art. 11, § 15, G. S., p. 43.)

Under this constitution the Legislature of the State was prohibited from releasing the lien of the State upon any Railroad. The constitutional ordinances provided for an annual tax of 10 per centum up to the 1st of October, 1868, and 15 per centum after that date, to be applied to the payment of the principal and interest then due or to become due on the bonds issued as a loan to the several railroads in the State.

The prior lien of the County of St. Louis upon the earnings of the Pacific Railroad, for the payment of the monthly interest into the county treasury, until the said 700 bonds are paid and satisfied by the Railroad Company, has in no way been affected by any provision in the constitution or by any act of the Legislature of Missouri.

The State Legislature had no power to affect the validity of the prior lien of the county upon the earnings of the Pacific Railroad, under the act of Jan. 7, 1865, which was accepted by the county and the Pacific Railroad Company, and became a vested right in the county, on the de-

livery to and the acceptance of the bonds by the Railroad Company. (Rec., p. 72.)

The testimony of Wm. Taussig one of the County Justices shows the point clearly. He says: "The Fund Commissioner being a state officer, and he having charge of the funds, the security was really considered a State security * * *." (Rec., p. 73.)

On the 30th day of November, 1866, the Pacific Railroad issued a printed financial statement, stating: "$700,000, at 7 per cent. per annum, due the County of St. Louis for bonds maturing in 1885, for which there is *no lien* on the road."

By a resolution of the County Court of March 25th, 1867, the presiding justice was ordered to "cast the vote of the county for directors of the Pacific Railroad, for those gentlemen who are opposed to the sale of the road, unless the interest of the County of St. Louis is protected by the terms of sale." (Rec. p. 73.)

On the 31st of March 1868, the Legislature of the State of Missouri, passed an act entitled, "An act for, the sale of the Pacific Railroad, and to foreclose the State's lien thereon, and to amend the charter thereof." (Laws of Mo. p. 114.)

The first section of this act provides for a sale of the Railroad, under the provisions of the act of February 22d, 1851.

The 2d section fixed the minimum sum at which the road should be sold at auction to any party other than the State, at $8,350,000, by directing the Governor to bid at least that amount.

The 3d section provides that the purchaser of the road should, within ten years, change the gauge of the road to conform to that of the Union Pacific.

The 4th section provides for the execution of a deed to the purchaser on payment of the purchase money, etc.

The 5th section authorized the sale of the Pacific Rail-

road to the Pacific Railroad Company, for $5,000,000 in cash or bonds of the State of Missouri, and directed the Governor, on the payment of that sum into the State treasury, to execute and deliver to the Pacific Railroad Company "a deed of *release* for all claims, title or interest which the State of Missouri has in and to the said Pacific Railroad, its property and appurtenances;" the said company thereupon to "be fully discharged from all claims or debts due the State, and all liability growing out of the issue of the bonds of the State, to aid in the construction of said road; and no sale, in that event, shall take place under this act."

The sale of the Pacific Railroad was consummated under this act, by the payment of the five million dollars and the execution and delivery of the deed. It is apparent that the debt and lien of the State on and against the Pacific Railroad Company was, at that time, $8,350,000.

The State regarded the $700,000 in county bonds, issued as aforesaid, to be a prior lien to that of the State upon the earnings of the Pacific Railroad, as will appear from sections 6 and 10 of this act, which are as follows:

"§ 6. In case of a sale of said road under the provisions of sections 1, 2, 3 and 4 of this act, the State of Missouri shall *assume the payment of the principal and interest* due on $700,000 in bonds issued by the County of St. Louis as a loan to the Pacific Railroad Company under the act of January 7, 1865."

"§ 10. All bids and proposals for the purchase of said road shall assume, *first*, the payment of principal and interest due, and to become due, on the $1,500,000 first mortgage bonds, issued under the act of February 10, 1864: *second*, the *principal* and *interest* due on the $700,000 bonds, issued by the County of St. Louis to the Pacific Railroad Company, under the act of January 7, 1865; third, the floating debt of said Pacific Railroad Company,

existing at the time of the passage of this act, not to exceed the amount of $650,000; and all bids and proposals for leasing said road shall assume the payment of the floating debt of said Pacific Railroad Company, existing at the time of the passage of this act, not to exceed the amount of $650,000. And all bids, whether for a purchase or lease of said road, shall be based upon a stipulation, on the part of the purchaser or lessee, to change the gauge of said road to conform with the gauge of the Union Pacific Railroad, eastern division, within the period of two years from the date of sale or lease."

§ 12. Abolished the office of Fund Commissioner. The President and Directors of the Pacific Railroad Company succeeded to his powers and duties.

The Fund Commissioner paid the interest on the said County bonds from March and May, 1865, to the County Treasurer, until the abolition of his office on the 31st of March, 1868.

The Pacific Railroad Company, as his successor, paid the interest thereon to the County Treasurer from 1st of April, 1868, up to the 1st day of ~~June~~, 1875.

After the purchase of the road from the State, the Pacific Railroad executed a *first* mortgage of July 15, 1868, on the whole line of road and its appurtenances to secure bonds for $7,000,000. (Record p. 2.) A second mortgage on the same property, dated July 1st, 1871, to secure bonds for $3,000,000.

In March, 1873, the General Assembly of Missouri adopted a concurrent resolution to test the question whether the act of 31st of March, 1868, under which the Pacific Railroad had been sold to the company for $5,000,000, when $8,350,000 were justly due, was authorized by the Constitution of Missouri. The State employed J. T. Phillips and Britton A. Hill as counsel to assist the Attorney General in the prosecution of the claim of the State, by

advertising the road for sale if the company failed to pay the unpaid bonds loaned to the company by the State, then amounting to $3,350,000.

The Pacific Railroad Company claiming a title to the Railroad under the said act of 31st of March, 1868, released from all liens of the State, on the payment of only 60 per cent. of the amount due; filed a bill in equity in the Circuit Court of the United States, in June, 1873, to enjoin the Governor and Attorney General of Missouri from advertising the Pacific Railroad for sale, under the statutory lien, for the $3,350,000 remaining due to the State in 1868, and interest for five years and two months, $1,039,166.66, to be added thereto.

The defendants insisted that the said act of 1868 was unconstitutional and void, and that the Pacific Railroad Company was bound by the statutory liens of 1851, 1855 and 1857, to pay the full amount due the State for the State bonds loaned to the company.

The Master finds in his report (Rec., p. 76) as follows:

"*Twenty-eighth.* That on July first, 1873, Uriel A. Murdock and Luther C. Clark, the trustees in the aforesaid 'first mortgage,' filed a bill of complaint in the Circuit Court of the United States for the western district of Missouri, to enjoin the Governor of the State from selling the property of the Railroad under a lien, which was claimed by the State still to subsist in its behalf. The nature and purpose of this case are disclosed in the case of Murdock vs. Woodson (2 Dillon C. C., 188), and in the same case on appeal to the United States Supreme Court (22 Wallace, 351). In the bill of complaint it was averred as one of the equitable, if not legal, grounds for sustaining the release which had been made by the State of its lien, under the provisions of the act of March 30th, 1868, that, if the road had been sold under the State's lien, the County of St. Louis and other creditors would have been foreclosed;

but that the release by the State to the company left the stock of the city and county, and the taxpayers of the county, amounting in the aggregate to $2,278,000, intact, and left the liability remaining on the *proper party* (the Pacific Railroad Company) to pay the floating debt of the company and the bonds issued by St. Louis County. The said bill of complaint also contained the following recitation:"

"They (the complainants) say that the road was finally put in running order, through to the western boundary of the State, in the year 1866; but the Dresden bonds, together with the loan of the county credit, as aforesaid, proved insufficient to pay for such extension, and for the repairs and equipments rendered necessary by the circumstances hereinbefore stated, and at the time of such completion of the road there remained due by the company (which was chiefly held by citizens of Missouri, for labor and materials) a large floating debt, which, in equity and good conscience, together with *the loan by St. Louis County*, possessed claims for payment not inferior to those possessed by the State under its statutory mortgage."

The Briefs of the Hon. W. M. Evarts, J. B. Henderson and James Baker of counsel for the Pacific Railroad, filed in this Court in said cause placed the case upon the distinct ground, that the act of 1868, fixed the price at which the Pacific Railroad should be sold by the State, at $8,350,000; the State, in case of a sale of the road under the §§ 1, 2, 3, 4, assumed by the sixth section of the act, the payment of the principal and interest due on 700,000 dollars in bonds issued by the County of St. Louis as a loan to the Pacific Railroad Company under the act of January 7th 1865, and the floating debt of the company not to exceed $650,000; and any purchaser of said road under § 10 of said act should assume in addition thereto the $1,500,000 (Dresden) first mortagage bonds, and an agreement to change the

gauge of said road to confirm with the gauge of the Union Pacific Railroad, within the period of two years from the date of sale or lease.

These burdens and liens under the act of 1868, were assumed by the Pacific Railroad Company, in Nov. 1874, to amount to about $3,350,000, and they were to be accounted as an equitable part of the consideration paid to the State and its citizens,, which added to the $5,000,000 paid by the company to the State in cash, made up the full price of $8,350,000, then due to the State by the Railroad Company, in accordance with the 2d section of said act.

This court held the sale of the Road for $5,000,000 under the circumstances was valid, and it is certain, that the Pacific Railroad Company acquired the title to the railroad under the act of 31st of March 1868, free and discharged from all liens to the State, as held by this Court in that case (22 Wallace 351). The Pacific Road was bound to pay all other liens, the Dresden mortgage, the County bonds lien for principal and interest, and the unsecured indebtedness, $500,000 for change of gauge.

On the experation of 90 days from the 31st of March 1868, the Pacific Railroad Company, was discharged of and from all other liens and mortgages except the Dusden mortage and the St. Louis County statutory lien amounting ing to $2,200,000. By the purchase of the Railroad under the said act, the company became bound to pay said mortgage and statutory lien, the floating debt and the cost of changing the gauge, and all other debts whatsoever.

First.—On the 15th of July 1868, a "first mortgage" by the Pacific Railroad Company, was made to trustees to secure bonds to the amount of $7,000,000, and covering the entire line of road, but not the tolls or earnings. (Printed Record, p. 2.)

Second.—A "second mortage" also covering the same

property, the entire line of road, dated July 1st, 1871, and securing bonds to the amount of $3,000,000, of which $2,800,000 were oustanding at the date of the filing of the bill (p. 3). The tolls and income are not granted by this mortage. The Dresden mortgage of 1864 was paid off by proceeds of this last mortgage.

Third.—A "real estate mortgage," on certain real estate in the city of St. Louis, dated April 19th, 1872, securing bonds to the amount of $800,000, (p. 3.)

Fourth.—A "Carondelet branch mortgage" on a branch thirteen miles long, extending from the main line to Carondelet dated October 1st, 1873, securing bonds to the amount of $500,000.

The mortgage under which the foreclosure proceedings were sought to be had, was dated July 10th, 1875, was made subject to all the four mortgages above named, and wss given to secure bonds to the amount of $4,000,000 (p. 5); but the tolls and earnings of the road are not granted by any of the mortgages.

The trustees in all the mortagages referred to, as well as the Pacific Railroad, were made defendants in the foreclosure proceedings.

On May 3, 1876, the Court appointed Receivers to take charge of all the Company's property (p, 17).

On June 6, 1876, a decree of foreclosure was rendered in the case, in which a sale was ordered to be had by the Master (p. 24.) Such sale was had (p. 33) on September 6. 1876, at which James Baker became the purchaser.

This sale was confirmed by the Court on October 6th, 1876 (pp. 29, 30), and a deed was made under the order of the Court, and the Missouri Pacific Railway Company, as assignee of James Baker, the purchaser, thereupon took possession of all the property which had been covered by the third mortgage.

The County of St. Louis was made a party to the orig-

inal proceeding, but on the 20th of April, 1876, being prior to the decree of foreclosure, it filed an intervening petition in the case (p. 36.) This was not passed upon by the Court at the time of the decree, but the decree contained a provision as follows (Rec. pp. 28 and 29):

"It is further ordered, adjudged and decreed that nothing in this decree shall be construed to prejudice in any manner the claim of the County of St. Louis to a lien on the property and franchises of the said Pacific Railroad alleged by the said county to exist, as fully appears by the amended petition in this cause, filed by the said county, for securing the payment of a certain debt of the said Pacific Railroad to said county for the sum of $700,000 and interest thereon, and alleged and claimed by the said County of St. Louis to be a prior lien therefor over all other incumbrances upon said property and franchises, the question of the existence and priority of said lien to be hereafter determined by this Court, if not otherwise satisfactorily adjudged."

INTERVENING PETITION OF THE COUNTY OF ST. LOUIS.

On 20th of April, 1870, the intervening Petition of the County of St. Louis was filed. Record p. 37, as follows:

First.—The county of St. Louis, a municipal corporation of the State of Missouri, by leave of the court in this cause, comes and files this its intervening petition herein, and respectfully represents to this honorable court and shows that said county of St. Louis is a corporation duly organized under the laws of the State of Missouri being a political subdivision of said State, with full powers under the laws thereof to sue and be sued, plead or be impleaded.

Second.—That the Pacific Railroad is a corporation duly organized under the laws of the State of Missouri, and was at the several times hereinafter mentioned, and now is, the owner of the Pacific Railroad (of Missouri) extending from St. Louis, in said State, westwardly to Kansas City, on the western boundary line of said State.

Third.—That on the 7th January, 1865, the Legislature of the State of Missouri passed an act entitled "an act authorizing the county of St. Louis to issue bonds," in words and figures as follows:

"Be it enacted by the General Assembly of the State of Missouri, as follows:"

"§ 1. The county court of St. Louis County is hereby authorized to issue 700 county bonds of the denomination of one thousand dollars each, having twenty years to run, and bearing interest at the rate of seven per cent. per annum, payable semi-annually, the principal and interest payable in the city of New York, and loan said bonds to the Pacific Railroad Company for the completion of said road; said bonds to be issued under such conditions as may be agreed upon between said county court and the board of directors of the Pacific Railroad Company, such conditions to be binding on the parties, but shall not impair or affect the validity of bonds after they are issued.

"§ 2. The Fund Commissioner of the Pacific Railroad, or such person as may at any time thereafter have the custody of the funds of said Railroad company, shall, every month after said bonds are issued, pay into the county treasury of St. Louis county, out of the earnings of said Pacific Railroad, $4,000; and $1,000 additional in each month of December, to meet the interest on the said 700 bonds; said payments to continue until said bonds are paid off by the Pacific Railroad. This act to take effect and be in force from and after its passage."

Fourth.—That thereafterward, on the 18th of January, 1865, the following order was adopted by the County Court of St. Louis county, namely: "The provisions of an act of the General Assembly of the State, entitled 'An Act authorizing the county of St. Louis to issue Bonds,' approved January 7, 1865, is hereby by the county of St. Louis accepted; and upon a passage of a resolution of the board of directors of the Pacific Railroad, binding them likewise to the provisions of said act, an issue of the bonds of the county to the amount of 700, each of the denomination of $1,000, having twenty years to run, and bearing interest at the rate of seven per cent. per annum payable in the city of New York semi-annually, is hereby ordered; which are to be delivered to and by the county to the Pacific Railroad for the completion of said road; and the Pacific Railroad is likewise required, by the action of its board and its authorities, to assume the prompt payment of said bonds at their maturity, so that the same may constitute a legal indebtedness on the part of said Pacific Railroad to the county of St. Louis for the bonds hereby ordered to be issued and loaned. The said bonds are to be sold upon such terms as this court, or its presiding officer may agree upon."

Fifth.—And thereafterward at a meeting of the Board of Directors of the Pacific Railroad, held on January 19, 1865, the following resolutions was adopted:

"RESOLVED, That the Board of Directors of the Pacific Railroad unanimously accept of the terms, provisions, and obligations set forth, and contained in an act of the General Assembly of the State of Missouri, entitled 'an act authorizing the County of St. Louis to issue bonds,' approved January 7, 1865, to be observed and faithfully performed by this company, and that the President be, and is hereby instructed to execute an agreement under the seal of the company, obligating the said company to promptly pay at maturity the said bonds authorized to be issued by said act

"RESOLVED, further, That this company accept of the terms and provisions of an order of said County Court now here present and certified by the clerk of said court under its seal, and hereby obligates the company to an observance and faithful performance of all the provisions contained therein."

And your orator avers and says that the order of said county court, referred to in the above-mentioned resolution of January 19, 1865, was a certified copy of the order of said County Court made January 18, 1865; that the same had been, by the clerk of said court, certified and delivered on said last-mentioned day to the board of directors of said Pacific Railroad, in like form and manner as above set forth.

Sixth.—And your orator shows that thereafterward, on the 20th of January, 1865, a copy of the resolution of the board of directors of the Pacific Railroad, adopted 19th January, 1865, as above set forth, was filed in said St. Louis County Court.

Seventh.—And that thereafterward, on February 3d, 1865, the said court made the following order of and concerning the premises, namely:

"That nothing further is needed to bind the Pacific Railroad in the matter of the loan of seven hundred of the bonds of the county to said company for the completion of

said road; the resolution of the company of the 19th inst. obligates it to an observance and faithful performance of the order of the court of the 18th inst. for the prompt payment of said bonds at their maturity.

And thereafterwards there was executed and delivered by the county of St. Louis its bonds of like description, as set forth, 700 bonds of $1,000 each, which said bonds were received by said Pacific Railroad in amounts and dates as follows: 100 bonds, February 20, 1865; 200 bonds, March 7, 1865; 400 bonds, May 6, 1865; which said bonds were afterwards sold by said Pacific Railroad, and the proceeds realized therefrom used in the completion of said road.

Eighth.—Your orator further shows and says, that on the 10th day of January, A. D. 1865, the president of the Pacific Railroad, for and on behalf of the company, presented to the County Court of St. Louis county the written opinion of the law officer of the corporation, Geo. E. Leighton, Esq., an attorney at law, in words and figures, as follows:

ST. LOUIS, Jan. 10, 1865.

Col. Geo. R. Taylor, President Pacific Railroad.

DEAR SIR:—In reply to your communication of yesterday, touching the construction and effect of the second section of the act approved January —, 1865, I have to say:

The Fund Commissioner is a public officer, created by the act of February 10, 1864. His position and duties, as defined by that act, are in general terms, those of a general trustee or receiver, holding, with the assent of the company (as expressed by the acceptance of the act), the earnings of the company upon certain expressed trusts, among which are paying expenses of operating, etc., the road, paying interest and principal of loan under that act, and paying interest upon and purchasing State bonds. It is in the last of these only that the State, as *cestui que trust* under the relations so established, has an interest which could be affected by legislation.

The first section of the present act authorizes the county court to loan, etc., under such conditions as may be agreed upon.

Although not mentioned in express terms, the act presupposes, or rather anticipates, an agreement to the effect that the money for the payment of interest upon these bonds shall be furnished the county out of the earnings of the company.

But as such an agreement could not be carried into effect, for, under the act of Feburary 10, 1864, such earnings are not within the control of the company, but are in the hands of the Fund Commissioner (as trustee) for the benefit of the State as a *cestui que trust*, the second section is enacted for the purpose of giving effect to such agreement, and makes it the duty of the Fund Commissioner to pay out of the earnings of the road certain sums monthly.

If the act should be accepted by the company, and the county court should make the loan authorized, the act would be binding upon all the parties in favor of the county court, to wit, the company, the Fund Commissioner, and the State; neither could object to its execution.

An agreement executed by the company, expressing its assent to such appropriation of the earnings of the road, would then, in my opinion, create in favor of the county an equitable lien or charge upon the earnings, *pro tanto*.

The direct authorization of such an appropriation of the earnings, or rather the direction to the Fund Commissioner (the trustee) to pay the monthly appropriation out of funds to the benefit of which it (the State) is entitled, is unquestionably, in my opinion, a waiver or postponement of the interest of the State as *cestui que trust* in favor of the county, to the extent and for the purposes specified in the act.

The act admits of no other construction. The first section of the act which authorizes the loan is enacted by the

State purely in its legislative capacity. The second is in effect, a partial release of its interest, for the State can have no legal control over this fund except as a *cestui que trust*, under the relations heretofore established and then only over its interest. In this respect it occupies no higher relation than an individual would holding the same claims.

By directing therefore, with the assent of the company, a different appropriation of the funds to which it was before the passage of the act entitled, it postpones or waives its own claim to that extent in favor of the party authorized by this act to receive, viz, the county of St. Louis.

The claim of the county upon the earnings of the road under this act could be easily enforced. The Fund Commissioner is a public officer, and where his duty is well defined and, as under the second section of this act, purely ministerial, he may, in case of a failure to pay over the amount monthly as directed by the act, be proceeded against by mandamus, and compelled to peform the duty enjoined upon him by law.

Very respectfully, your obedient servant,

GEO. E. LEIGHTON.

That the said opinion to the effect that the act of 1865 and its acceptance by the company would constitute and create a lien, was presented by the company for the purpose of inducing the county of St. Louis to loan to said company the said sum of seven hundred thousand dollars, and relying upon said representation, and agreeing to the construction of the act of Jan. 7th. A. D. 1865, as to the creation of a lien in favor of the county, the said loan of seven hundred thousand dollars was made to said company.

Ninth.—Your orator, intervening as aforesaid, further shows unto this honorable court that the Fund Commissioner of the Pacific Railroad was created by public laws of the State of Missouri, known as the act of February 10, 1864, sections 5 and 6, and the act of 19th of November,

1857, sections 4, 5 and 7 of said act; and said Fund Commissioner was and is a State officer, commanded and required to hold the custody of the moneys of the Pacific Railroad, and it was made the duty of said Fund Commissioner, as such State officer, to pay out of the earnings of the said Railroad company the monthly interest stated, until the said seven hundred bonds were paid off by said Pacific Railroad.

Tenth.—Your orator further says that at the time the said act of the General Assembly of the State of Missouri, approved January 7, 1865, was passed and took effect, the State of Missouri had a claim against said Pacific Railroad for bonds loaned said company by the State for about $8,000,000, on which the State claimed a statutory lien as a first mortgage, and on the 31st of March, 1868 a public act of the State of Missouri was passed and approved, to sell and compromise the claims of the State of Missouri against said Pacific Railroad for the sum of $5,000,000, to be paid to the State by said Pacific Railroad.

And by said act of 1868 it was further declared, in § 6, that in case of a sale of said road under the provisions of sections 1, 2, 3 and 4 of the said act of 1868, the State of Missouri should assume the payment of the principal and interest due on $700,000, in bonds issued by the county of St. Louis as a loan to the Pacific Railroad under said act of January 7, 1865.

And by § 10 of said act of 1868 it was further declared as follows: "All bids and proposals for the purchase of said road shall assume, first, the payment of principal and interest due and to become due on the $1,500,000 first mortgage bonds issued under the act of February 10, 1864; second, the principal and interest due on the $700,000 bonds, issued by the county of St. Louis to the Pacific Railroad Company under the act of January 7, 1865; and other matters."

And the said Pacific Railroad, in accordance with the provisions of said act of 1868, compromised the debt of $8,000,000, and interest thereon, for $2,050,000, by paying the State $5,000,000, the Pacific Railroad assuming to pay the said statutory lien in favor of St. Louis county, for $700,000 principal, and $49,000 a year interest, as it existed under said act of 1865; all of which appears from the face of said acts of 31st of March, 1868, and January 7, 1865, which are public acts of the said State of Missouri, of which the mortgagees holding mortgages subsequent in date to the 31st day of March, 1868, have constructive notice, and are notified in law of the lien of the county of St. Louis therefor of that date.

Eleventh.—And your orator further says that afterwards, on the 29th day of June, 1872, a lease was made by and between "the Pacific Railroad" aforesaid and the Atlantic and Pacific Railroad Company of the Pacific Railroad, its rolling stock, tracks, depots, fixtures, and appurtenances of every kind, and all its leased lines, for a period of 999 years, at certain rents and on certain conditions thereinnamed, which lease was duly sealed, executed and delivered by the Pacific Railroad, signed by the president and secretary of each of said railroad companies, on the day of its date. And in the said lease it was recited that the said Atlantic and Pacific Railroad Company should pay, as and for annual rent on said lease, the interest accruing and to become due and payable from and after the date of said lease upon $7,000,000 six per cent. gold bonds issued by said party of the first part, dated August 1, 1868; upon $3,000,000 of 7 per cent. currency bonds also issued by said party of the first part, dated July 1, 1871; upon $700,000, being the amount of certain bonds of the county of St. Louis, which were by said county loaned to the said party of the first part, and which it undertook and agreed to pay, and which are due and payable on the 1st of February,

1885, with interest at the rate of seven per cent. per annum; all of which will more fully and at large appear by reference to said lease.

Twelfth.—And said lease was duly executed by the respective parties, sealed, acknowledged, and recorded in the recorder's office of each county in the State of Missouri through which said Pacific Railroad runs, and every mortgagee, including the complainants, has full and constructive notice of the said statutory lien under the acts of January 7, 1865, and of March 31, 1868, and they had further notice of the equitable lien of said county of St. Louis for the said $700,000 and interest thereon, and that such equitable lien had priority over all liens created after the 31st day of March, 1868, and priority over the lien of complainants.

And your orator further shows to this Honorable Court that the said lien of the county of St. Louis is and has always been recognized to be a statutory lien, valid and existing under the said acts of 1865 and 1868, and also in the said lease of 1872.

Thirteenth.—And your orator further shows that the said bonds for $700,000 loaned by said county of St. Louis to the Pacific Railroad in March and May, 1865, were sold by the Pacific Railroad, and the proceeds were applied by the Pacific Railroad to build bridges and repair the said railroad and depots, and the statutes of 1865 and 1868 gave notice of said equitable lien and statutory lien to all the world and to the trustees and mortgagees in this suit and both as an equitable lien and as a statutory lien it has precedence over all liens and mortgages made or executed subsequent to the 31st day of March, 1868, and has priority over the mortgage complainants seek to foreclose in this suit.

Fourteenth.—Your orator further shows that, from and after the date of the execution and delivery of said 700 bonds of $1,000 each, the monthly installment of interest

of $4,000 per month, including $1,000 additional for the month of December, so due and payable as aforesaid under the terms and conditions of said act of January 7, 1865, and the terms of said contract made pursuant thereto, were paid from time to time, up to and including the month of May, 1875, but that no payment has been made for the months of June, July, August, September, October, November, December, 1875, or for the months of January, February and March, 1876, and that the amount of interest on said loan now due the county of St. Louis from said Pacific Railroad (except for the present month of April, 1876, and which is also unpaid) amounts to $41,000.

Fifteenth.—Your orator further shows that, by reason of the premises, there exists a statutory lien and charge under said acts of January, 7, 1865, 1855, 1857 and 1868, the said lease and contracts made in pursuance thereof, and an equitable lien under the statute, of which public notice is given by the statutes to all the world in favor of the county of St. Louis, upon all the earnings of said Pacific Railroad, that the same is prior to all other liens upon said road of every kind and description whatsoever, and that the same is entitled to a preference of payment over all other charges and demands against said Pacific Railroad.

Sixteenth.—The county of St. Louis, as intervenor, further shows that in this cause, on the 8th day of April, 1876, an order was made appointing Joseph L. Stephens, John H. Beach and Oliver Garrison, citizens of Missouri, receivers of the Missouri Pacific Railroad in this cause; that by virtue of their office they have been since said last-mentioned date, and now are, in possession and operating the said Pacific Railroad, receiving and having custody of the funds of said Pacific Railroad Company. Wherefore the intervenor prays that its said lien claimed for said interest so due as aforesaid, amounting as aforesaid to, $41,000, and the said sum of $700,000 herein mentioned and claimed as being a lien stat-

utory and equitable, may be established by this court, that said Pacific Railroad Company be required to answer this intervening petition; that cause may be shown, if cause there be, why the relief prayed for may not be granted; and this intevenor prays for an order that said receivers be required to pay this intevenor's claim out of the earnings of said Pacific Railroad in their posession as such receivers, and for such other and further relief as to equity and good conscience appertains, and as this court shall deem meet.

FRANK J. BOWMAN,
Solicitor for County Court of St. Louis County.
BRITTON A. HILL,
Of Counsel for County Court of St. Louis County.

The intervening petition was referred to a Master in Chancery, who reported upon the facts substantially in accordance with the facts in the preceding statement and intervening petition. The Master's Report is given in full in the Record from p. 57 to p. 81. The opinions of the County Counsellor in January, 1865, do not appear to have been given upon any well considered views of the facts, the statutes or the law. (See Rec. pp. 68–9, 70.)

On the 10th of May, 1876, order to modify the order of the 3rd of April, 1876, so as to empower said Receivers to pay said $41,000, monthly interest due the County of St. Louis up to the 31st day of March, 1876; on the express condition that the said county shall refund the same when, and as this court may hereafter order, if this court shall decide on proper hearing had, that said county is not entitled to receive the same. (Rec. p. 43.)

This amount—$41,000—was paid by the Receivers to the County Treasurer, in full for interest due the county up to the 31st day of March, 1876.

The intervening petition of the county was filed the 20th

of April, 1876, and the complainants filed their demurrer on the same day. (Rec. p. 44.)

This demurrer was overruled on the 23rd of September, 1876. (Rec. p. 45.)

Complainants thereupon filed an answer traversing nearly every statement in the intervening petition. (Rec. p. 46 to 52.)

The intervenor filed a reply to this answer February 8, 1877, traversing every material allegation thereof. (Rec. p. 53 to 57.)

On the 25th of April, 1877, on hearing and examining the report and the proofs before the master and the arguments of counsel, the Circuit Court, DILLON and TREAT, J.J, made the following decree:

It is ordered, adjudged and decreed, that the county of St. Louis is entitled to an equitable lien or charge upon the earnings of the said Pacific Railroad, to whomsoever the same may be transferred or conveyed, prior and paramount to any mortgage or other lien thereon; that the earnings of said Pacific Railroad be and the same are hereby charged with a lien in the sum of four thousand dollars per month, payable monthly from the first day of April, 1876, and the further sum of one thousand dollars, payable in each month of December, to meet the interest of seven hundred bonds loaned by said county of St. Louis to the Pacific Railroad on the 18th day of January 1865, shall be fully paid off by the Pacific Railroad; the said equitable charge is hereby decreed to exist and be enforceable on said earnings of said railroad property and franchises, against the funds in the hands of the receivers herein, and the purchaser under the mortgage sale heretofore ordered.

It is further ordered, that the costs herein to be taxed, be paid out of the fund in the registry of this court to the credit of this cause, including a master's fee to Seymour D. Thompson, of one thousand dollars.

And now the said respondents, by their solicitors, pray the court to grant them an appeal from the decree herein, to the Superme Court of the United States, which said appeal is allowed as herein prayed, upon the said respondents giving an appeal bond in the sum of fifty thousand dollars, to be approved by the court, and that upon the filing and approval of said bond a supersedeas be awarded, staying futher proceedings on the enforcement of said decree. (Printed Record, pp. 81-82.)

The appeal was duly perfected May 4, 1877.

Afterwards, the city of St. Louis moved, in this court,

to be substituted as intervening petitioner herein, in lieu of the county of St. Louis, because certain governmental changes had taken place which were set forth in the motion, and thereupon the following order was entered:

George E. Ketchum, *et al.*, appellants, vs. The county of St. Louis, intervenor. The motion of the city of St. Louis, praying that it might be substituted in place of the said county of St. Louis, having been considered by the court, it is, upon consideration thereof, this 4th day of March, 1879, ordered that said city of St. Louis be, and it is hereby allowed to intervene in the said cause, for the purpose of protecting such interest as it may have therein, and for the purpose of being heard at the argument of the cause if it shall so elect.

BRIEF AND ARGUMENT.

First. The Act of the Missouri Legislature; authorizing the county of St. Louis, to issue $700,000 dollars in bonds of $1000 dollars each, having twenty years to run, at seven per cent. interest per annum, with semi-annual coupons attached; approved on the 7th of January 1865; accepted by the Pacific Railroad Company on the 19th of the same month, upon proposal of the said county of St. Louis, of the preceding day, to issue said bonds pursuant to said act; and loan them to said company, for the completion of said railroad; *created a statutory lien upon the earnings* of the Pacifiic Railroad, until the said bonds, and interest were paid, upon consummation of the proposed statutory contract between the state, the Railroad Company and the county of St. Louis, by the issue of said bonds to said company, and the sale and use of the proceeds thereof for the rebuilding and completion of said railroad. (Rec. 62 to 67.) See Acts of 1851, 1855, 1857, 1864 and 1865, cited in the preceding statement of the case.

Second. The said statutory contract between the State, the county of St. Louis, and the Pacific Railroad Company, was consummated by the acceptance of the conditions of the statute, by the county and the company and the delivery of the 700 bonds to the railroad company or the Fund Commissioner, in February, March and May 1865. (Rec. p. 72.) These bonds were sold and the proceeds were used as required by the act, for the completion of said Railroad. (Rec p. 72.)

Prior to the conclusion of the negotiations for the loan, the Counsellor for the Railraad Company, on the 10th of January, 1865, gave his written opinion to the company, that "if the Act should be accepted by the company, and "the County Court should make the loan authorized, the

"act would be binding upon all the parties in favor of the "County Court, to wit, the Company, the Fund Commis- "sioner, and the State, and neither could object to its exe- "cution." (Rec., p. 66, 7.)

This opinion was sent to the County Court to influence the judges to accept the act and make the loan represented to be secured by a statutory lien on the earnings of the Railroad, having priority over the statutory lien of the State, and capable of enforcement by law. (Rec., p. 66, 7,) The opinion of the County Counsellor was adverse to this view of the law, but the familiarity of the Railroad Counsellor with the Legislation of the State concerning the Pacific Railroad, enabled him to decide for the company, that if the county made the loan, the payment of the monthly interest and the principal, would be secured by a first lien on the earnings of the Pacific Railroad.

The County Court acted upon this view of the law and made the loan and concluded the statutory contract. The Pacific Railroad Company accepted the act of 1865, and received the bonds and sold them under the supervision of the Fund Commissioner.

Third.—The intent, of the act of January 7, 1865, passed by the Missouri Legislature, acting in its sovereign capacity as law maker within the constitutional limitations, is to be ascertained from the whole legislation concerning the Pacific Railroad, and the history of that period.

It clearly appears from the previous enactments of the General Assembly of the State, that the Pacific Railroad was built and equipped, for the most part out of the proceeds of State bonds, loaned to the Pacific Railroad Company, for that purpose, on the statuary condition, accepted by the company, that a lien on the road and its earnings should be reserved to the State to secure and enforce the payment of the State bonds and interest.

The following amount of bonds were authorized to be loaned to the Pacific Railroad Company, under the several acts of the General Assembly of Missouri, prior to the 10th of Febuary 1874, when the State placed a Fund Commissioner as a Receiver in charge of the road and its *gross earnings*, to secure the State, in the payment of the principal and interest on its said bonds: to wit:

Act 22 Feb. 1851, § 4. § 9. p. 265.	Bonds	loaned	$2,000,000
" 25 Dec. 1852, p. 263,.....	"	"	2,000,000
" 3 Mar. 1855, p. 172,.....	"	"	300,000
" 10 Dec. 1855, p. 472,.....	"	"	3,000,000
" 12 Dec. 1855, p. 484,.....	"	"	250,000
" 3 Mar. 1857, p. 85,.....	"	"	2,000,000
" 19 Nov. 1857, p. 59,.....	"	"	600,000
			$10.150,000

Of these amounts of State bonds authorized; only $7,000,000 of bonds were issued by the State and loaned to and accepted byt he Pacific Railroad company, on the conditions stated.

The company paid interest at 6 per cent. on these bonds up to July 1859, but from that date, no more interest was paid. The war of the rebellion came on in 1861, greatly obstructing the trade and business of the railroad, which became impoverished, and the State being the principal creditor; secured by a statutory first lien on the railroad and its appurtenances and its earnings also; became alarmed for the security of its loans to the company, and in Febuary 1864, on its application to make a further loan of $1,500,000 dollars, to complete the road on its western half, from Dresden to Kansas City; the State bonds being then worth about forty cents on the dollar and not available as a loan to the company;—the General Assembly of Missouri enacted a statute on the 10th of February 1864, (Laws p.

50.) authorizing the company to borrow the $1,500,000, by issuing bonds at 7 per cent interest having 4, 5 and 6 years to run, secured by a mortgage on the railroad. To aid the company in selling these bonds, the State relinquished its first lien and mortgage and right of forfeiture upon said road west of Dresden, retaining however, a second lien and mortgage thereon, to become forthwith the first lien and mortgage in every respect upon the payment in full of principal and interest of the said bonds authorized by the act.

The Railroad Company was then insolvent, nine semi-annual coupons on the $7,000,000 dollars bonds loaned the Company had been paid by the state, increasing the debt due the State $2,000,000 dollars, and under these exigencies, the war becoming more general and destructive; the State Legislature annexed as a condition to this act, that the Company should consent, to the statutory appointment of a Fund Commissioner in fact a Receiver of all the gross earnings of the Railroad and of all the proceeds of the Dresden bonds, who should superintend all the operations of the Railway Company; make monthly statements of the business of the railroad to the Governor, and any outlay outside of the actual operating expenses, deemed necessary by the directors of the road, shall first be approved by the Governor and Chief Engineer before the same shall be paid by the Fund Commissioner.

The Pacific Railroad Company accepted said act with all its conditions, and the statutory Receiver called a Fund Commissioner entered upon the exercise of his functions, receiving all the gross earnings, the proceeds of the Dresden bonds etc., and paying all expenses of every description and returning full monthly statements of all the accounts to the Governor.

The State had three statutory liens at the time the act of Jan. 7th, 1865 was passed. First, A lien on the eastern

half of the Railroad and its appurtenances. Second, A lien on the *tolls* and *income* of the Railroad. Third, A second lien on all the west half of the Railroad its *tolls* and *income* between Dresden and Kansas City.

The Railroad and its appurtenances were then forfeited to the State for non-payment of interest on the State bonds for five years and a half; and the Railroad Company had accepted the act of February 10th, 1864, granting to the State all the gross earnings of the railroad and the proceeds of the Dresden bonds and the sole control of all the expenditures and the new work on the Railroad.

4th. The sole power to create the new lien in favor of St. Louis County, was vested in the General Assembly of the State on the 7th of January, 1865. In the exercise of a sovereign power, the State Legislature proposed a new contract between the Pacific Railroad Company and the County of St. Louis, granting the county a vested right to be paid by the Receiver of the State and the Company, or whoever might thereafter have the custody of the funds of said Railroad Company, the monthly interest on the bonds loaned by the county to the company. The right of the Fund Commissioner to receive all the gross earnings of the Railroad under the act of February 10th, 1864, was waived *pro tanto* by the State until the bonds were paid off by the Pacific Railroad. The intent of the Legislature was to give the county a lien on the earnings of the Railroad—then in possession of, and wholly under the control of the Receiver of the State, for the completion of the Railroad—for the payment of the interest and principal of the bonds loaned by the county to the company for the same purpose.

The exigencies of the company had then become greater than they were a year before. The war was still raging. Gen. Price's raid into his old home had caused the destruction of the railroad bridges, track, depots, etc., and the State was then unable to aid the company in any way upon

its own credit. The county was offered this prior lien upon the earnings, *pro tanto*, and with the assent of the company and the State accepted it, and delivered its bonds upon that statutory security.

5th. This statutory lien and tripartite statutory contract became a vested right in May, 1865, when the full amount of the 700 bonds were issued by the county, and received and accepted by the company; and the Fund Commissioner doubtless took possession of these moneys by virtue of his office, and expended them in completion of the Railroad, as required by the act of February 10, 1864.

6th. The State had a vested right, under its own legislation, as mortgagee in possession to all the *tolls* and *income*, and to all the gross earnings of the Railroad, on the 7th of January, 1865, and having that vested right, granted it to the County of St. Louis, and commanded its agent, the Fund Commissioner, and all persons who may thereafter have the custody of the funds of the Pacific Railroad Company, to pay into the County Treasury every month $4,000 and in December $1,000 more; "said payments to continue until said bonds are paid off by the Pacific Railroad." (Record p. 65.)

Seventh. In the absence of all other liens on the Eastern half of the railroad, between Dresden and St. Louis, except the lien to the State, the lien of the County of St. Louis, on the earnings *pro tanto* took priority over the lien of the State, by force of the act commanding so much of the *tolls* and *income* of the road as were necessary to pay the monthly interest, to be paid into the County treasury, until the principal of the bonds was fully paid.

Eighth. The prior lien of the County on the earnings of the railroad, to the extent of the monthly interest until the principal is paid; is a right acquired from the State, by force of the act of January 7th, 1865, and this vested right is recognized and established by the act of March 31, 1868,

under which the Pacific Railroad Company and the complainants claim title to the Railroad from the State of Missouri, the then common source of title. The deed of release to the Pacific Railroad by the State, for all claims, title, and interest which the State of Missouri then had in, and to, the said Pacific Railroad, its property and appurtenances, passed the title and the possession of the railroad and its appurtenances to the Company for the consideration of $5,000,000, to the State paid, and vested in the company the State title; "and the Pacific Railroad Company shall, from and after the delivery of said deed, be fully discharged from all claims or debts due the State, and all liability growing out of the issue of the bonds of the State to aid in the construction of said road" * * * * . § 5, act of 31st of March, 1868, Laws of Mo., 114.

This conveyance and said statute of 1868 being held constitutional and valid by this Court in the case of Woodson & Ewing v. Murdock & Clark, 22 Wallace 351, the title of the complainants is derived under said act, and the deed executed in pursuance thereof. The complainants have thus, constructive notice of said act, which is a public act, and gives notice to all the world, of the enactments therein.

Ninth. The mortgage on which a decree of foreclosure has been entered on the bill filed in this cause was executed more than seven years after the approval of the act of 31st of May, 1868, under which the Pacific Railroad Company acquired title and possession of the Railroad, and a release of all State liens. But the 10th section of that act expressly declares that all bids and proposals for the purchase of "said road shall assume" among other liabilities, "the "principal and interest due on the 700,000 dollars bonds, "issued by the County of St. Louis, to the Pacific Rail-"road Company, under the act of January 7, 1865 * "* * ."

Section 12 of said act declares that, "In case of sale, as

prescribed in sections two and five, the office of Fund Commissioner is hereby abolished, * * * by virtue of which provision, the possession of the road and the moneys and credits, in the hands of the said Receiver or Fund Commissioner were surrendered to the Pacific Railroad Company; upon the conditions stated in the act, which act was accepted by the company, and insisted upon before this Honorable Court in said case 22 Wallace, p. 351, as vesting the Company with title to the Railroad; under all the said conditions, and this claim of said Company was held to be valid in the decision of said cause, and estops the Company and all persons claiming title under it, from questioning that title.

Tenth.—The public act of 1868, gave notice to all the world of the statutory lien of the county of St. Louis upon the earnings of the railroad, by an express reference to the act of 1865, creating that statutory lien. If the act of 1865, were a private act, the act of 1868 gives full notice of it.

Eleventh.—The complainants have notice of all the other public acts of 1851, 1852, 1855, 1857 and 1864, as of the day when said several acts were approved or within ninety days thereafter. The lease of the Pacific Railroad, to the Atlantic and Pacific Railroad for 999 years, executed in 1872 and recorded in the same year, in every county in Missouri, through which the Pacific Railroad runs, also gave notice of the liability of the lessee to pay the 700,000 dollars bonds loaned by the County of St. Louis to the Pacific Railroad Company.

Twelfth. The said Company took possession of the said Railroad, its depots, rolling stock, moneys, credits and effects from the State, immediately upon the passage of the act of the 31st of March 1868, under the authority conferred by the statute. The sale of the Railroad and its appurtenances, under §5 of said act coupled with the abolition of the office of the Fund Commissioner (§12.) oper-

ated as a legislative sale accompanied by a transfer of the possession, and a relinquishment of all rights, titles and claims of the State and all State liens thereon. This transfer did not in any manner affect the first lien of the County of St. Louis upon the earnings of the Pacific Railroad, because the Act of 1868, expressly binds the puschaser of said Railroad, to "*assume* the *payment* of the *principal* and *interest* due on the seven hundred thousand dollars bonds, issued by the county of St. Louis to the Pacific Railroad Company, under the act of Janurary 7, 1865," and for the further reason that the proper construction of the railroad acts of Missouri prior to said act of 1865, vested in the County a prior lien to the State upon the earnings of the Railroad, for the payment of said principal and interest due and to become due on said bonds.

Thirteen.—The subsequent proceedings of the parties interested, will aid the Court in determining, the construction given by them to the said acts of 1865 and 1868. The State liens and claims having been extinguished by the sale under the act of 1868; there remained only two liens, on the railroad; the Dresden mortgage of 1864 and the County lien of 1865. § 10 of the act of 1868, required the purchaser of the road to assume the payment of the principal and interest due and to become due, on these two liens, the first by mortgage on the Road, the second by a statutory lien on the earnings of the Railroad.

The Dresden mortgage of Feb. 1864 was to secure three sums of $500,000 each, due in 4, 5 and 6 years from date.

This was satisfied by the Railroad Company paying the several bonds when they fell due, out of moneys raised by a new mortgage of the 15th July 1868.

The monthly interest on the County loan payable out of the earnings of the railroad, was promptly paid by the company to the treasurer of St. Louis County from the 31st day of March 1868, to the 1st day of March 1875, when the

Pacific Railroad Company ceased to pay the monthly interest to the county out of the earnings of the railroad.

Through all vicissitudes of fortune the Pacific Railroad Company up to that day, had faithfully paid out of the earnings of the road, the monthly interest falling due to the county under the acts of 1865 and 1868, and in strict compliance therewith.

On the 1st of July 1871, the Pacific Railroad Company made a second mortgage to secure bonds for $3,000,000; and on the 29th of January 1872, it leased its Railroad for 999 years to the Atlantic and Pacific Railroad for a rental of about $1,000,000 per annum; and by the convenants in said lease, the Atlantic and Pacific Railroad Company agreed to pay the interest accruing on the various bonds of the Pacific Railroad and also upon; "certain bonds of the "county of St. Louis, which were by said county loaned to "the said Pacific Railroad, and which it undertook and "agreed to pay, * * * all of which said bonds, except "the St. Louis County bonds, are secured by mortages." "*The lien of St. Louis County*, is not spoken of otherwise "then in the language which I have quoted." Master's Report. (Rec. p. 75, 76.)

The Atlantic & Pacific Railroad Company, as lessee of the Pacific Railroad, continued to pay the monthly interest on the county bonds for the Pacific Railroad Company, the lessor, from the 29th day of January, 1872, to the 1st of May, 1875.

Fourteenth.—The validity of the county lien, as created by the public Statutes of February 10th, 1864, January 7th, 1865, and March 31st, 1868, and recognized by the parties interested, for eleven years and four months, is to be determined by the construction of said statutes and the prior Railroad Laws cited.

My associate counsel, in this case, have cited many cases to show this lien of the County of St. Louis upon the

earnings of the Pacific Railroad for the payment of the monthly interest on the county bonds loaned the Company, is an equitable lien, if it be not a statutory lien. There seems to be no reasonable doubt of this. When I drafted the intervening petition, I averred the said lien to be a statutory lien valid and existing under the said acts of 1865 and 1868. (Rec., p. 41.) In all the exhaustive investigations made by me since the filing of the intervening petition in April, 1876, I have seen no decision or argument to cast a doubt upon my mind as to the correctness of that conclusion.

The learned and able opinion of the Hon. John F. Dillon in 1877, in the Circuit Court of the United States at St. Louis, seems to be conclusive upon the questions now presented to this Honorable Court. (2 Dillon, C. C. Rep. 78.)

In addition to the cases cited by my associate counsel in St. Louis, on the questions of equitable and statutory liens on lands and railroads, I refer to the following.

Matter of Howe, 1 Paige, Rep. 125, 128-9, 130.
Cook v. Craft, 3 Law., 516.
Racouillier v. Lauwain, 32 Cal., 375.
DePiene v. Thorn, 4 Bosw. Sup. Ct. R., 266.
2 Story Eq., §§ 718, 719, § 1503.
Chase v. Peck, 21 N. Y., History of the Laws of Equitable Liens.
Foster v. Faust, 2 Sergt. & R., 11.
3 Binney, p. 347, Note S. C.
Duggett v. Rankin, 31 Cal., p. 321.
1 White and Tudor Leadg. Cas. in Eq., 941 (top page).
Willard's Eq. Jur., 298-9, 440 (top page).
Payne v. Wilson, 74 N. Y., p. 348.

As to the kinds of property which may be mortgaged in equity, it is held that whatever property, personal or real, that is capable of an absolute sale, may be the subject of

a mortgage. Therefore rights in remainder and reversion possibilities, coupled with an interest, rents, franchises and *choses* in action are capable of being mortgaged.

4 Kent's Com., p. 144.

Williamson v. Brown, 15 N. Y., p. 354.

The true doctrine on this subject is, that where a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed, either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered as a *bona fide* purchaser.

Kramer v. The Trustees, etc., of the Farmers' Bank of Steubenville, 15 Ohio, p. 253.

Merrills v. Swift, 18 Conn., p. 266.

Lewis v. DeForest, 20 *Id*, p. 412.

Ketchum v. Jauncy, 23 *Id*, p. 127.

The lien of the county, whether equitable or statutory, is a lien upon the *earnings* of the Pacific Railroad, is the only existing line of that kind, and it was vested in the county by the public acts of 1865 and 1868. The complainant's title passed to them by the mortgage of 1875, in strict compliance with the conditions of the act of 1868, of which the Pacific Railroad Company has actual notice, as well as the mortgagees and purchasers.

The deed of mortgage of July 10, 1875, does not convey the *earnings* of the railroad, nor are the *earnings* or *tolls and income*, conveyed by the mortgages of July 15, 1868, or July 1, 1871.

If this lien upon the earnings be legal or equitable. it is the only lien upon the earnings of the Railroad, and the complainant's mortgage does not cover them.

Fosdick v. *Schall*, 99 U. S. Rep. 251.

Hale v. *Frost*, 99 U. S. Rep. 389, in point.

U. States vs. The Cent. Pacific R. R., 99 U. S. Rep. 449.

U. States vs. Kan. Pac. R. R., 99 U. S. Rep 455.

U. States vs. Sioux City & Pacific R. R., 99 U. S. Rep. 491

We ask for the affirmance of the decree of the court below, and that the court below be ordered to enter a decree for the City of St. Louis, as the legal representative of the County of St. Louis, for so much as remains to be paid as monthly interest out of the earnings of said Pacific Railroad.

St. Louis, January 8th, 1880.

BRITTON A. HILL,

of Counsel for the County and City of St. Louis.

IN SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1879. No. 162.

GEORGE E. KETCHUM et als., Appellants,

vs.

THE COUNTY OF ST. LOUIS, Intervenor, Respondent.

ORAL ARGUMENTS

FOR RESPONDENT,

By P. PHILLIPS and FRANK J. BOWMAN,

AND

REPLY OF HENRY A. CLOVER

TO QUESTIONS BY THE COURT.

WASHINGTON:
JUDD & DETWEILER, PRINTERS.
1880.

Supreme Court of the United States.

OCTOBER TERM, 1879.

No. 162.

GEO. E. KETCHUM ET AL.

vs.

COUNTY OF ST. LOUIS, INTERVENOR.

ORAL ARGUMENT OF MR. P. PHILLIPS.

JANUARY 21, 1880.

May it please your Honors: the amount involved in this case is a large one, and, of course, that gives interest to the cause; but the legal proposition in the case is a very small one, and is easily disposed of. There is some difficulty in establishing a state of facts to which the principle of law attaches, but when that is done the legal proposition involved in the question of equitable assignments is as plain and as well recognized as any doctrine that has ever received the adjudications of this Court. There is no controversy, or conflict of opinion, so far as the judgments of this Court are concerned, as to what will constitute an equitable assignment or trust that will be enforced.

In order to ascertain the facts to which we are to apply the law, we are to recur to what has occurred in the State of Missouri in reference to this transaction:

In 1849 the Legislature of Missouri incorporated this company to build a railroad from the city of St. Louis to the western boundary of the State, some 300 miles in extent; and to aid the road to acomplish this purpose, the State issued these bonds, which, in 1855, amounted to some $7,000,000, the State having an absolute lien upon the road, with the right of sale.

The CHIEF JUSTICE: That was a statutory mortgage?

Mr. PHILLIPS: Yes, sir.

In 1861, about 180 miles of this road had been completed.

In 1864 we come to the first material fact in this case. In that year the legislature, finding that this company was wholly in default, sequestered the property of the company, took it into its possession, and administered it under its officer designated as a Fund Commissioner, with directions that he should make certain payments.

The road being still unfinished in 1864 (the State having taken administration of the road) it was provided by that act that the company should be authorized to borrow $1,500,000 for the purpose of building the unfinished portion of the road, which was, I think, about 80 miles, to Kansas City, on the western boundary of the State. The bonds to be issued were called the Dresden Bonds, and to the extent of that 80 miles the State relinquished its first lien in favor of the Dresden Bonds, for the completion of the road, reserving a second lien, which second lien was again to become a first lien when those bonds had been satisfied.

The money was borrowed and expended, but during the civil war this road was raided by hostile forces, and was so injured and damaged as to render the appropriation of these Dresden Bonds wholly ineffectual for the purposes contemplated.

I desire to refer to the graphic description given of the

condition of things by Mr. Justice Miller, when a branch of this litigation was heretofore considered. He says:

"The railroad companies emerged from the war with their roads in a state of repair which hardly admitted of use, and the rolling-stock so deteriorated that new supplies were indispensable. Their credit was low; their means exhausted; their property apparently worth but little. They were unable to meet their obligations to the State, and were largely in arrears for interest on the State bonds. The State itself was in little better condition. To the heavy burden of increased taxation imposed by the Federal Government, was now added the necessity of paying interest on the large debt the State incurred in aid of the railroad companies."

Mark, that the State and the company were in this helpless condition in the year 1865, after the Dresden Bonds had been exhausted and failed to accomplish the object for which they were issued. It was then County of St. Louis was called upon to advance $700,000 of its bonds, for the purpose of accomplishing this great work.

I.

As a first step in this matter, I desire to call your Honors' attention more particularly to what has been referred to in the opening argument as the proceedings which took place in the county court, when the judges of that court were asked to make this loan to the company. There were two propositions submitted. This was one: (I read from pages 63 and 64 of the record.)

"Mr. Justice Fisse submitted the following for the action of the Court, viz:

"Whereas, the directors of the Pacific Railroad Company have submitted to the Court their memorial setting forth the condition of the company, as well as the injury done it by the recent rebel raid into our State by the destruction of so large a portion of its property, and praying

the Court to issue, under authority to be obtained, $700,000 St. Louis county bonds. * * * *

"It is ordered by the Court that they will not be adverse to issue St. Louis county bonds to the amount $700,000 in aid of completing the Pacific Railroad to Kansas city, if the following conditions are embodied in the law to be passed for that purpose:

"(1.) The county court to be authorized to issue $700,000 St. Louis county bonds in aid of the Pacific Railroad Company, the proceeds of which shall be used for no other purpose than completing the road to Kansas city. * * *

"(2.) The State to relinquish so much of the mortgage on the road as covers the rolling-stock, which shall then be mortgaged by the company to the County of St. Louis as security for the $700,000 bonds issued."

Notice that in this proposition, which was originally introduced, there is a direct requirement for security. The State, the holder of the whole lien upon the road and upon its property, was to relinquish it in favor of the county, to the extent of the loan to be made by the county.

In this first proposition there is this additional condition that a vote of the people of the county who were to pay this debt if default should be made, should be taken. That is left out in the second proposition, for, to take a vote would require time. Besides, there was the contingency as to the result of the vote.

Now we will see what this second proposition was:

"It is ordered, in view of the importance of the completion of this road to the tax-payers of this county, that this Court will concur in case application should be made by the Pacific Railroad [to the Legislature] in the propriety of the passage of the following act *securing* the completion of the road and the interest of the County of St. Louis in the issue of said bonds."

Now, what is the proper construction to be given to this resolution? The condition was the passage of an act securing to the county the completion of the road *and* the inter-

est of the county in these bonds. The county had undoubtedly two interests: It had an interest in the completion of the road as facilitating commerce and agriculture. This in a greater degree but of the same character any other county would have through which the road should pass. That interest was protected by the first section of this resolution, to wit, *the completion* of the road.

But it does not stop there. The act was also to secure the *interest of the county in the issue of said bonds.* What does that refer to? Not again to the completion of the road, because that has already been stated. It is coupled with a conjunction: "*and* the interest of the county." It is something else, therefore, than the interest in the completion of the road. What was intended by the parties who drew it—not with very great grammatical skill—not in the most appropriate manner possible to use—by adding the conjunction after "the completion of the road" *and* the interest of the county in the issue of these bonds? I say that it was intended to have security for the interest payable on the bonds.

Another fact I desire to call to the attention of the Court: The draft of the act which accompanied this resolution, upon which application to the legislature was made, recites that the *Fund Commissioner* of said Pacific Railroad shall monthly pay into the treasury in advance $4,000.

May it please your Honors, when this act was carried by the railroad company to the legislature to have it passed as drafted by the county court, the legislature at once saw that the object the county had was not secured by the terms which it had used, because they had merely said that the Fund Commissioner should make the monthly payments. The legislature knew that under the act of 1864, the office of Fund Commissioner would terminate in a certain event, viz., when the Dresden Bonds and State bonds were paid. Therefore, looking to this contingency, it inserted in the second section of this act, which is now the

subject of your construction, after the words "Fund Commissioner," these words: "or such person as may at any time hereafter have the custody of the funds of said Railroad Company."

Now, the act of 1865, thus amended, was duly accepted by the county, and the corporation (the Pacific Railroad) duly filed its acceptance of it with the Secretary of State.

Stopping just at this point of the case, what do we have? I would like to remind the Court as to who are the contestants here. On one side they are the County of St. Louis, claiming by virtue of a loan of $700,000 to this company to enable them to complete their road, and make this great work valuable to the company and to the State, on their side asserting that they had and have a right to claim this as a lien upon this road which they had so rendered valuable in 1865; and on the other side the contestant is one who, in 1875, (ten years after this transaction,) becomes interested as a mortgagee upon this property. These are the parties contesting before this Court.

When the company accepted this act, the effect of the issue of the bonds under it was to convert the provisions of the second section into a contract by which the company consented that the Fund Commissioner, who had the right to receive all its funds, "or any other person who should at any time thereafter have the custody of its funds," should every month pay out of the earnings of the road the specified sum necessary to meet the interest on the bonds, which payment, it was provided, should continue until the bonds were fully paid by the said road.

Here was a contract between the only parties in existence who had any interest—the State, the Railroad Company, and the County of St. Louis. No other person had a right to challenge this transaction, or was in any wise interested in disputing it. The company accepted it; the county accepted it; the State agreed to it; and what was it? The State having the lien, and the right to use the funds of the

company for the preservation of its lien, says to the County "if you will loan this $700,000 for the completion of this road, I will yield my lien to the extent of $4,000 per month in favor of the County."

Who else was interested? The railroad company; because, though the State was administering this property, it was the property of the railroad. Then the party, owner of the property subject to the administration of the State, comes in and says: "Your order upon the Fund Commissioner, or any other person who shall hereafter have the funds of this railroad company, to pay to the county this $49,000 per month, is a proper and good thing, and I consent to it." That is the transaction.

It was as though it had originated in an order from the corporation; as though the railroad corporation had said to the Legislature, "I want to borrow $700,000 from the county, and you will administer my funds; I will give an order upon the Fund Commissioner, or any body else who may hereafter come into possession of the funds of this road, if you will consent that $4,000 of the income of this property shall be paid monthly to this county." It is precisely the same whether it had originated with the railroad company, or with the State, the railroad company consenting; it makes no difference.

But, may it please your Honors, going a little more into this question of intent, to be found outside of the expression of the legislature itself, I must refer to what I consider a very important fact in this case as illustrating that intent, and that is a letter written by Mr. Leighton, the attorney of the Railroad Company, to Mr. George R. Taylor, the president of the Railroad Company, dated January 10, 1865, three days after the passage of the act of 1865, and laid before the County Court. I must read this letter, at a little risk of wearying the Court, because I conceive that it is important. It is addressed, as I said, to Mr. Taylor, president, and by him presented to the County Court three days

after the passage of the act, and, of course, prior to the execution of the act by the issuing of the bonds. He says:

"The Fund Commissioner is a public officer created by the act of February 10, 1864. His position and duties, as defined by that act, are, in general terms, those of a general trustee or receiver, holding, with the assent of the company, (as expressed by the acceptance of the act,) the earnings of the company upon certain express trusts, among which are paying expenses of operating, etc., the road, paying interest and principal of loan under that act, and paying interest upon and purchasing State bonds. It is in the last of these only that the State, as *cestui que trust*, under the relations so established, has an interest which could be affected by legislation.

"The first section of the present act authorizes the County Court to loan, etc., under such conditions as may be agreed upon.

"Although not mentioned in express terms, the act presupposes, or rather anticipates, an agreement to the effect that the money for the payment of interest upon these bonds shall be furnished the county out of the earnings of the company.

"But as such an agreement could not be carried into effect—for under the act of February 10, 1864, such earnings are not within the control of the company, but are in the hands of the Fund Commissioner (as trustee) for the benefit of the State as a *cestui que trust*—the second section is enacted for the purpose of giving effect to such agreement, and makes it the duty of the Fund Commisssioner to pay out of the earnings of the road certain sums monthly.

"If the act should be accepted by the company, and the County Court should make the loan authorized, the act would be binding upon all the parties in favor of the County Court, to wit, the Company, the Funding Commissioner, and the State; neither could object to its execution.

"An agreement executed by the company, expressing its assent to such appropriation of the earnings of the road, would then, in my opinion, create in favor of the county an equitable lien or charge upon the earnings *pro tanto*.

"The direct authorization of such an appropriation of the earnings, or rather the direction to the Fund Commissioner (the trustee) to pay this monthly appropriation out of funds

to the benefit of which it (the State) is entitled, is unquestionably, in my opinion, a waiver or postponement of the interest of the State, as *cestui que trust* in favor of the county to the extent and for the purposes specified in the act.

"The act admits of no other construction. The first section of the act which authorizes the loan is enacted by the State purely in its legislative capacity.

"The second is in effect a partial release of its interest, for the State can have no legal control over this fund except as a *cestui que trust* under the relations heretofore established, and then only over its interest. In this respect it occupies no higher relation than an individual would holding the same claims.

"By directing, therefore, with the assent of the company, a different appropriation of the funds, to which it was before the passage of the act entitled, it postpones or waives its own claim to that extent in favor of the party authorized by this act to receive, viz., the County of St. Louis.

"The claim of the county upon the earnings of the road under this act could be easily enforced. The Fund Commissioner is a public officer, and where his duty is well defined, and, as under the second section of this act, purely ministerial, he may, in case of a failure to pay over the amount monthly, as directed by the act, be proceeded against by mandamus, and compelled to perform the duty enjoined upon him by law." (Record, p. 39.)

This letter was presented to the county judges prior to their action under the act of 1865, as the Master finds, evidently with the purpose of influencing their action. Placed there by whom? By Mr. Taylor, the president of the corporation to be bound by the lien. What motive could have induced Mr. Taylor, the president, to have sought that opinion from the attorney of the corporation, and to have presented it to the board before it acted? What other motive is it possible to assign to this transaction than that it was intended to say to them, "If there is any doubt about the construction of this act don't hesitate to make the loan which we apply for, for I, as the representative of this corporation, here present you the legal opinion of the attorney

of that corporation that there is no other construction to be placed upon the act of 1865, than that it gives to you a perfect security for your loan.

May it please your Honors, this letter was made a part of the intervening petition prior to the time when the case was referred to the Master to make a report upon all the facts in the case. The parties, therefore, knew of the existence of that letter, and as to the necessary use that would be made of it in the discussion as to the intention of the parties to this contract. They went before the Master. There other testimony was adduced. Where were Mr. Taylor and Mr. Leighton? If there was any explanation to be given in reference to this letter which could at all take away from it the influence which it would necessarily have upon any who were called upon to pass upon this question, why were not Mr. Taylor and Mr. Leighton present before the Master? They were, gentlemen, living then and living now in St. Louis, where this reference was had. The reason to be found is that no explanation could be made.

To offset this letter of Mr. Leighton, as showing what was the intention of the County Court when they entered into this contract of loan, they produced a letter, which was also found in the same archives, in which Mr. Clover, at that time the attorney of the county, is called upon to give his opinion on this question: "Does this act secure the County of St. Louis, beyond all contingencies, a lien upon this property?" He answers: "It does not, beyond all contingencies." The question which he considered in that letter was the right of the State in reference to these Dresden bonds, amounting to $1,500,000, then outstanding, to lessen the security given by act of 1864.

But take this latter letter in any light you please. Suppose they were both before the County Court when it acted. I say it had the right to act upon the opinion given by that party who was to be bound by the lien, and in the making of the

loan they would be fully justified in relying upon that opinion, the opinion of their attorney to the contrary.

I said, in the opening, there is no difficulty whatever in the law of the case. The difficulty is in arraying the facts. Therefore, I have taken up, I am afraid, a great deal more time than I ought to have occupied in going over facts in the history of this case, so as to now make the application of the law.

II.

What is the proposition? It is this:

That if a debtor, by a concluded agreement with a creditor, sets apart a specific amount of a specific fund in the hands, or to come into the hands, of another from a designated source, and directs that such person should pay it over to the creditor, which he assumes to do, this is a specific appropriation binding upon the parties and upon all persons with notice, who subsequently claim an interest in the fund under the debtor.

That is the legal proposition upon which this case must be determined. I say this proposition is well settled. I shall not fatigue you by reading cases, but I will use extracts and brief sentences, which bear upon this question. It is singular that several cases to which I shall refer for the doctrines I maintain, are relied on by the other side to show that the doctrine does not exist.

The first case I refer to is Spain *vs.* Hamilton, administrator, 1 Wall., 624:

"To constitute an assignment of a debt or other chose in action, in equity, no particular form is necessary. A draft drawn by A or B, in favor of C, for a valuable consideration, amounts to a valid assignment to C of so much of the funds of A in the hands of B. Any order, writing, or act which makes an appropriation of a fund, amounts to an

equitable assignment of the fund. The reason is, that the fund being a matter not assignable at law, nor capable of manual possession, an appropriation of it is all that the nature of the case admits of, and therefore it is held good in a court of equity."

General Hamilton had in the Treasury of the United States $100,000, the Bank of the United States had paid him for procuring the Government of the United States to assume the Texan bonds; and had given different orders to various parties upon that fund in the treasury.

Mr. Justice BRADLEY.—The fund being in existence at the time.

Mr. PHILLIPS.—Yes, sir.

Mr. Justice FIELD.—Were the orders accepted?

Mr. PHILLIPS.—No, sir. The fund was in the treasury, and of course the treasury would not accept any orders.

The next case is Christmas *vs.* Russell, 14 Wallace, 84, where the agreement was held not to amount to an assignment. This opinion was delivered by Mr. Justice Swayne, and thus opens:

"An *agreement* to pay out of a particular fund, however clear in its terms, is not an equitable assignment."

The learned gentleman who opened the case has been misled by not distinguishing our case from those which rest on a mere agreement to make an assignment.

In this case of Christmas *vs.* Russell, Mr. Nugent, of Mississippi, had become bail upon an appeal bond for Christmas, who during the troubles of the war was in Europe. Nugent wrote to Christmas to make him secure upon that appeal bond. Christmas replied by certain letters, in which he promises that he will make him secure, and that he will devote to that purpose the proceeds of a certain note which he owned. That was the case. The question was, whether that was an assignment—Mr. Nugent contending that it was an assignment of a specific thing.

The Court said, it is nothing more than a promise to do the thing, and that no property passed, holding that—

"An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect."

"The phraseology employed is not material, provided the intent to transfer is manifested. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund, any authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee. The transfer must be of such a character that the fund holder can safely pay, and is compelled to do so, though forbidden by the assignor."

In this case the State had said to the County, "loan this railroad $700,000, and I yield to you my lien to the extent of $4,000 per month." The State could not recall that, without violating the obligation of good faith.

The gentlemen says that a mandamus would not lie to compel payment by the Fund Commissioner; I think it would. There may be difficulty in some cases. This case is unlike that of Christmas; here there is no power of revocation, but an absolute transfer of interest in a thing, viz.: the earnings of the road, which the party owner of the earnings consented should be made.

I have stated the doctrine as defined by this Court. How is the doctrine stated in other courts of the highest ability? In the case of Pinch *vs.* Anthony, 8 Allen, the Court said:

"The rule is perfectly well established that a party may by express agreement create a charge or claim in the nature of a lien on real as well as on personal estate of which he is the owner or possessor, and that equity will establish and enforce such charge or claim not only against the party who stipulated to give it, but also against third persons who are either volunteers or who take the estate on which the lien is given with notice of the stipulation. Such an agreement raises a trust which binds the estate to which it relates,

and all who take the title, thereto with notice of such trust, can be compelled in equity to fulfill it."

Paragraph 1231, of 2 Story's Equity Jurisprudence, says:

"Liens may be created on the purchase money due on the sale of an estate, in favor of a vendee, if it is agreed that the money shall be deposited in the hands of a third person, to be applied in discharge of prior encumbrances, to the extent of such encumbrances. Indeed, there is generally no difficulty in equity in establishing a lien, not only on real estate but on personal property, or on money in the hands of a third person, whereever that is a matter of agreement, at least against the party himself, and third persons, who are volunteers, or have notice. For it is a general principle in equity, that, as against the party himself, and any claiming under him, voluntarily, or with notice, such an agreement raises a trust."

In speaking of the want of a common law jurisdiction in the assignment of choses in action, Mr. Story, at paragraph 1840 *ib.*, says:

"But courts of equity have long since totally disregarded this nicety. They accordingly give effect to assignments of trusts, and possibilities of trusts, and contingent interests, and expectancies, whether they are in real or personal estate, as well as to assignments of *choses in action*. Every such assignment is considered in equity, as in its nature amounting to a delaration of trust and to an agreement to permit the assignee to make use of the name of the assignor in order to recover the debt, or to reduce the property into possession. Contingent rights and interests are not ordinarily assignable at law; and yet they may sometimes be assigned at law if coupled with some present interest. So at law such rights and interests may pass by way of estoppel, by lease and release, or by fine. But the reach of this doctrine at law falls far short of that now entertained in equity. To make an assignment valid at law the thing which is the subject of it must have actual or potential existence at the time of the grant or assignment. But courts of equity will support assignments, not only of *choses in ac-*

tion, and of contingent interests and expectancies, but also of things which have no present, actual or potential existence, but rest in mere possibility; not, indeed, as a present positive transfer operative *in presenti*, for that can only be of a thing *in esse*, but as a present contract to take effect and attach as soon as the thing comes *in esse*."

In all of these authorities, the case of Legard *vs.* Hodges, in 1 Vesey, Jr., is cited for this doctrine, and here is a brief statement by the chancellor:

"I take this to be a universal maxim: that wherever persons agree concerning any particular subject, that in a court of equity, as against the party himself, and any claiming under him voluntarily, or with notice, raised a trust. These persons have so claimed; and therefore this a pure trust estate," and they must be declared trustees. (1 Vesey, Jr., 478.)

I now merely refer to the late works of Jones on Mortgages and on Railroad Securities, for a short extract upon this subject. If I may be permitted, I wish to say that these books entitle their author to the thanks of the profession. In chapter 5, p. 119, of "Jones on Mortgages," he says:

"In addition to these formal instruments which are properly entitled to the desigation of mortgages, deeds and contracts, which are wanting in one or both of these characteristics of a common law mortgage, are often used by parties for the purpose of pledging real property, or some interest in it, as security for a debt or obligation, and with the intention that they shall have effect as mortgages. Equity comes to the aid of the parties in such cases, and gives effect to their intentions. Mortgages of this kind are therefore called equitable mortgages."

Mr. Jones, in his work on railroad securities, at page 57, in speaking specifically as to this character of corporations, says:

"An agreement of a company to set apart specific earn-

ings or property in the hands of a third person to meet the interest or principal of its bonds, creates an equitable lien or charge."

"This legal proposition, which is an accepted doctrine of courts of equity, is tersely stated by Judge Dillon."

Mr. PHILLIPS.—No, sir; but he says that this is accepted doctrine.

Mr. Justice FIELD.—He does not give any cases?

Mr. PHILLIPS.—I believe not. But this opinion of Judge Dillon is in exact accord with all the decisions in this Court as to what constitutes an equitable assignment, and there is no authority to be found which controverts it.

An order to pay a debt out of a particular fund constitutes an equitable assignment, lien, or trust.

The authorities cited on the other side have no sort of bearing upon this proposition.

Hunt *vs.* Rousmanier, 5 Cond., 408,
Webb *vs.* Walker, 7 Cush., 50,
Rodger *vs.* Hosach, 18 Wend., 320,

are cited as in conflict with it.

A very brief examination will show that they are in entire harmony with all the decisions relied on by us.

In the two first the question arose on a power of attorney. In Hunt's case the opinion opens with the statement that the "instrument contains no word of conveyance." If, say the court, the word "interest" indicated a title to the *proceeds of sale*, and not a title to the thing to be sold, then the power to sell for his own benefit would be a power coupled with an interest. Such a power would survive the person giving it and would be executed after his death.

But, on the power in question, the court held that it was a mere naked power not coupled with an interest, and

though irrevocable by Rousmanier himself, expired on his death.

So in the case of Webb *vs.* Walker, it is said the instrument "only gives a power to sell and apply the proceeds. This is not a power coupled with an interest and amounting to an assignment." But, say the court, "when the party has conveyed an interest in the thing itself with a power to sell and appropriate the proceeds, the grantee takes something more than a naked revocable power."

The case of Hunt *vs.* Rousmanier, is cited as sustaining the decision.

In Rogers *vs.* Hosack, Gracie & Sons assigned, for benefit of creditors, a claim against the *British Government*, with a covenant by A. Gracie, that if this should be insufficient, "the deficiency should be paid out of any moneys received by *him*, his executors, &c., from the *French Government*, as soon as the same shall be received by him."

After A. Gracie's death the French Government agreed to pay $ to his executors. Thereupon a creditor filed his bill to enjoin the executor from receiving the same.

COWEN, J., held: "Here is no assignment, no mortgage, or pledge, no order, or any other specific appropriation of the French funds, but a *mere covenant* to pay them over on their being obtained by the covenantor."

Such an agreement does not create a lien either at law or in equity. (335.)

DICKINSON, J., fully approves the decision in Bradley *vs.* Root, 5 Paige, 641, and cites Yates *vs.* Groves, 1 Vesey, Jr., and other cases, as fully establishing that an order to pay a debt out of a particular fund constituted an equitable assignment and gave to the creditor a specific lien. Indeed, (says the judge,) this is established, as to orders, beyond controversy. But it requires little discrimination to discover the difference between an order which, both in terms

and legal effect contains an assignment, or the elements of one—being a direction to one to pay or deliver, with power to the other to receive and appropriate; *and a simple, naked covenant or agreement* to pay out of a particular fund, unaccompanied by any words of transfer, or any power or authority whatever in the premises.

It is thus shown there is no contrariety in these cases; and I repeat, that all the difficulty we have is to ascertain what are the facts; but as to the law to be applied to the facts, there is, in my opinion, no difficulty whatever.

III.

Now we come to another question—the estoppel that is set up against this municipal corporation. What is an estoppel? What are the principles of estoppel if they are applicable at all to the case in hand? In 18 Wall., 271, the Court gives this definition:

"An estoppel *in pais* is sometimes said to be a moral question. Certain it is, that to the enforcement of an estoppel of this character, such as will prevent a party from asserting his legal rights to property, there must generally be some degree of turpitude in his conduct which has misled others to their injury. Conduct or declarations founded upon ignorance of one's rights have no such ingredient, and seldom work any such result. There are cases, it is true, where declarations may be made under such peculiar circumstances that the party will be estopped from denying any knowledge of his rights; but these are exceptional, and do not affect the correctness of the general rule, as stated."

Again · in 93 U. S., 335, in the case of Brent *vs.* Virginia Coal and Iron Company *et al.*:

"It is difficult to see where the doctrine of equitable estoppel comes in here. For the application of that doctrine there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such

gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. 'In all this class of cases,' says Story, 'the doctrine proceeds upon the ground of constructive fraud or of gross negligence which in effect implies fraud. And therefore when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has been accordingly laid down by a very learned judge that the cases on this subject go to this result only: that there must be positive fraud or concealment or negligence, so gross as to amount to constructive fraud.'" (1 Story's Eq., 391.)

I must go very rapidly through this matter, merely pausing to say that, to sustain the estoppel, they aver that the company made a financial statement in which they said the county of St. Louis had no lien. What is that to us?

They say on another occasion you filed a proceeding in bankruptcy in which you asserted that you were an unsecured creditor to a certain amount. That is true. That proceeding was never carried into effect, but was dismissed by the counsel who commenced the proceeding before any action taken by the court.

In estimating the weight of this as an admission, we must remember that it was made ten years after the agreement of loan was made, and that none of those who represented the county at that time were in office when these proceedings were instituted.

Beyond this is the fact that they were instituted four months *subsequent* to the execution of the third mortgage now in controversy, and, therefore, could have had no influence upon its execution.

IV.

I come now to the question of notice.

I assert that this act of 1865 is a public act. Look at all of its elements. It conferred an important power upon a pub-

lic political corporation, viz., the power to subscribe $700,000, and that without the vote of the taxpayers of the county.

Again, it was for a public purpose of great interest to the State and all its inhabitants.

Again, it charged a public officer, holding the road for the benefit of the State, as to how to dispose of its revenues.

Such an act as this, may it please your Honors, this Court would take judicial notice of without proof, and all persons are bound by notice of its contents.

But again: This act of 1865 is recited three times in the the act of 1868, which they admit to be a public act. It presents three contingencies, referring to this demand of the county under the act of 1865.

What is a public act, and where are the limits by which you are to accurately define it? In 1st Kent's Com., 498, he says:

"There is a material distinction between public and private statutes, and the books abound with cases explaining this distinction in its application to particular statutes. It is sometimes difficult to draw the line between a public and a private act, for statutes frequently relate to matters and things that are partly public and partly private. The most comprehensive, if not the most precise definition in the English books, is that public acts relate to the kingdom at large, and private acts concern the particular interest or benefit of certain individuals or of particular classes of men. Generally speaking, statutes are public; and a private statute may rather be considered an exception to a general rule. It operates upon a particular thing or private persons."

In Sedgwick on the Construction of Statutory and Constitutional Law, page 25, after speaking of public and private acts, he says:

"In this country [*i. e.* the United States] the disposition has been, on the whole, to enlarge the limits of the class of public acts, and to bring within it all enactments of a general character, or which in any way affect the community at

large. The subject has been considered, as we shall hereafter see, with reference to the provisions of the Federal Constitution; and it has been held that the establishment of towns and counties and their boundaries, court-houses, jails, bridges and ferries, are all matters of public policy, and acts relating to them are of course public acts. * * * So, in Massachusetts, acts creating public corporations, whether sole or aggregate, are public statutes. Acts, too, which although affecting only a particular locality, apply to all persons, are public acts. So an act passed for the survey of timber in the county of Penobscot, in the State of Maine, and an act relating to the preservation of a particular fish in the Dunstan river, in Massachusetts, were each held public acts."

I have looked with some little diligence into the reports of this Court, but I do not find that this question has ever been thoroughly discussed or considered. But in 4 Cranch, in the case of Young *vs.* Bank of Alexandria, the Court held that the incorporation of the Bank of Alexandria was a public act; and in Griffin *vs.* Gill, 2 Black, an opinion delivered, I think, by Mr. Justice Field, in 1862, it was said that if the pleadings in that case had permitted it the Court would have taken judicial notice of the acts of California relating to the harbor of San Francisco, and particularly the Water-Lot act of 1821.

V.

The last matter referred to in the elaborate presentation of this case in the opening argument, and which I consider I am bound to follow, is the question of mortgage.

I submit that it would seem to be an undoubted proposition that the owner of property may make such disposition of it, or its proceeds in rents and earnings, present or future, as he may think proper, with the single limitation that such disposition is not in derogation of law; and that this really is as applicable to corporations as to individuals. In 2

Story Reports, 630, I read from the head note of the case of Mitchell *vs.* Winslow:

"To make a grant or assignment valid at law, the thing, which is the subject of it, must have an existence, actual or potential, at the time of such grant or assignment. A mere possibility is not assignable.

"But courts of equity support assignments, not only of *choses in action*, but of contingent interests and expectations, and also of things which have no present actual potential existence, but rest in mere possibility only."

Equity follows the doctrine of the civil law: *Quod emptionem venditionem que recipit, etiam pignorationem receipere potest.* Therefore, rights in remainder and reversion, possibilities coupled with an interest, rents, franchise and choses in action, are capable of being mortgaged.

2 Story's Eq., § 1021.

The CHIEF JUSTICE.—I suppose there is no doubt about that question, if there is power given to mortgage?

Mr. PHILLIPS.—I will just read one more case to complete this. In 23 Howard, 128, in the case of Pennock *et al. vs.* California, this Court say:

"We have no occasion, therefore, of calling in question, much less denying the soundness of the maxim so strongly urged against the effect of the mortgage upon the property in question, as its force and operation depend upon a different state of facts, and to which different principles are applicable. The inquiry here is not whether a person can grant, *in præsenti*, property not belonging to him and not in existence, but whether the law will permit the grant or conveyance to take effect upon the property when it is brought into existence and belongs to the grantor, in fulfillment of an express agreement founded on a good and valuable consideration."

It is hardly necessary to add that this question cannot arise here because there is a special act of legislation. That cannot be against law which the law authorizes.

May it please your Honors: I have gone over all I desire to say. I think the principles for which I contend are the principles which must lead to the affirmance of this decree. They are:

1. That the act of 1865 and the action of the County, Company, and State created a lien in favor of the County.

2. That the appellants had notice of it and are bound by it.

3. That nothing is shown in the record which estops the County from asserting it.

On these three propositions I submit this case with the greatest confidence that the judgment rendered by Judge Dillon ought to be affirmed.

ORAL ARGUMENT

OF

MR. FRANK J. BOWMAN,

THURSDAY, *January* 22, 1880.

REVISED AND CORRECTED.

IF THE COURT PLEASE:

Called upon to conclude an argument which has been so ably commenced by my associate counsel, I shall proceed at once, without preliminary remarks, to the consideration of that which seems to me to be the only question remaining open to discussion.

That question is this:

Was the lien given to St. Louis county by the act of 1865, of such a nature that it continued after the time when the Pacific Railroad Corporation ceased to be interested in the property of the road?

I apprehend that that is the only question in regard to which there can be a fair difference of opinion.

In order to clearly understand whether the lien claimed is of such a nature as to continue upon the property of the Pacific Railroad, after the first owner had ceased to be interested therein, it becomes necessary that we should carefully consider the prior and preliminary questions, viz:

What was it that the lien attached to? What was the nature of the lien given?

By reaching a proper solution of these questions, we shall

be able to determine as to the extent and duration of the lien.

I must say frankly to the Court that I take the view that there is not here involved a question of the "*construction of conflicting decisions*," but simply a question of the proper construction of the statute of the State of Missouri creating the lien.

This lien, we claim, is a statutory lien, created by the act of the Legislature of Missouri.

Clearly, the State of Missouri had the power to create such a lien. Did it create such a lien? Was it the intention of the Legislature to create such a lien as would continue, not only while the Pacific Railroad was interested in the property, but continue until the debt created under the act was paid? We contend that such was the intention of the Legislature of Missouri. We contend that apt words have been used in this act for that purpose.

If such a lien was given, and no act has been done or consented to by the county of St. Louis, to invalidate such statutory lien, given as an inducement for thus making the loan, then it follows that the lien is still in force, and should be made effectual by an affirmance of the decree of the circuit court. It becomes, therefore, only necessary in the consideration of this case, to inquire as to the true construction to be given to the act of January 7, 1865.

The surrounding circumstances under which this act was passed are proper subjects of consideration in order to determine the intention of the Legislature; for it is *the intention of the Legislature* that this Court will desire to inquire into, and by its decree, carry into effect.

The intent of the Legislature, I may pause here to remark, was the intent of the parties themselves who consented to and accepted the act.

Pursuing the line of argument here suggested in this connection, I invite attention to the second section of the act of 1865. I will read it:

"The Fund Commissioner of the Pacific Railroad, *or such person as may at any time thereafter have the custody of the funds of said Railroad Company*, shall every month, after said bonds are issued, pay into the county treasury of St. Louis county, out of the earnings of said Pacific Railroad, $4,000, and $1,000 additional in each month of December, to meet the interest on the said seven hundred bonds; *said payment to continue until said bonds are paid off by the Pacific Railroad.*"

What fund was it that was here set aside and given to the County of St. Louis, to the amount here specified? What was the nature of the fund that was thus set apart to the County of St. Louis?

I was much surprised at the remarkable position taken by the counsel for appellants, Mr. Day, in contending that there was doubt as to what funds were thus set apart to the use of the County. There is no possible doubt. If we turn to the act of 1864, which created the office of Fund Commissioner, and seek there to be intelligently informed as to what fund it was, against which this charge was created, we find it clearly defined in the third section of that act, which I have set forth in my printed brief, and which is also referred to on page 5 of Mr. Broadhead's brief. The language of that act is as follows:

"*The gross earnings of said road from all sources, shall be paid in daily to said Fund Commissioner.*"

This is very comprehensive language, but this is not all; for after thus referring to the income of the road, and the daily payment to the Fund Commissioner of all gross earnings: the act continues as follows:

"*And all other sources of revenue belonging to or connected with said railroad shall be under his control and be taken into his possession, as they arise.*"

The kind and nature of the fund on to which we are claiming a statutory lien, given by the authority of the State of Missouri is thus clearly defined.

It was not only all "*gross earnings of said road*," but it was *all funds* from *all sources connected with* this railroad property, it extended to all the property owned by the Pacific Railroad, so long as it remained *connected with the road*. If disconnected with the use of the property, it would then, and not till then, be discharged from the lien we claim.

I admit that there is one way in which the lien of the County could be defeated; but there is but one way in which it could be done, and that is by ceasing to operate or use the franchise privileges, and properties upon which the lien was given; and by ceasing to use that franchise, by ceasing to use that valuable right of way, 200 feet in width, extending from the eastern boundary of the State at St. Louis, to the western boundary at Kansas City; by ceasing to use this railroad property the income would be destroyed, and the County's lien claim would then become valueless. The term "Pacific Railroad" has a double meaning, or signification. It may be used in referring simply to the *corporation*; and it may be, and more commonly is used in distinguishing the *property* of the corporation.

It is marked upon its cars, stamped upon its tickets, and used to designate its property, as apt, and comprehensive words of description.

It is apparent that the Legislature, in the act of 1865, in the expression, "earnings of said Pacific Railroad," used those words as referring to and including all that was owned and possessed by that corporation, and as embracing everything that appertained to it as a railroad company.

This is the more apparent when the comprehensive terms of the act of 1864, creating this fund in the hands of the Fund Commissioner, are referred to, as furnishing a definition of the fund, and the sources from which it was to be derived.

Mr. Justice STRONG.—If your view is correct, would not the lien have a priority over the running expenses of the road? Suppose the running expenses of the road exhausted

the whole of the gross earnings and income, as they might well do, could it have been applied to the payment of these expenses; or, under your view, would it have been applied to the payment of this interest on the $700,000?

Mr. Bowman.—It is to that view that I next desire to address my argument.

I will read the section of the act of 1864 making provision for the operating expenses, and then will point out definitely and define the extent to which we claim this lien attaches to the funds and properties then owned by the the Pacific Railroad.

Mr. Justice Strong.—I understand you to say that what was meant by the earnings in the act of 1865 was defined in the previous act of 1864?

Mr. Bowman.—Yes, sir.

Mr. Justice Strong.—The act of 1864 speaks of gross earnings.

Mr. Bowman.—It does; and this lien attached to the gross earnings, as will be observed by my reference to the act of 1864: but this lien upon the *gross earnings was not a first lien*, but really a third lien. The act of 1864 provides specifically that the *operating expenses shall be first paid by the Fund Commissioner*. Therefore, we say that the *operating expenses are a first lien* as against that fund. They must be paid first. The Legislature so declared, and for obvious reasons.

By the provisions of the act of 1864, the proceeds of the Dresden bonds were placed in the hands of the Fund Commissioner; he was to sell the bonds, and use the proceeds in constructing the road.

And in the fourth section of the act it is provided that—

"Said Fund Commissioner shall, out of all *moneys arising from the sale of bonds*, as aforesaid, upon proper vouchers, *pay for the construction of* the extension and equipment of

said road, as aforesaid; *and out of all other moneys derived from other sources, as before designated*, in his hands and under his control, upon proper vouchers and receipts, *he shall pay for the operating of the road.*" (Sec. 4, Act of 1864.)

In my view of the case this provision created a *first* charge or lien against the *gross income* "from all sources," to pay the operating expenses, and very properly so. The road must be operated in order to have any income, and therefore these expenses were very properly given a priority.

The seventh section of the act of 1864 provides that from the NET *earnings* remaining after paying operating expenses, the Fund Commissioner shall make payment of his own salary. The remaining portion of the fund was then to be applied as directed in the first section of the act, which contained the following provision: "*All the net profits of the road shall be applied to the extension and equipment thereof until completed, as aforesaid;*" reserving, however, sufficient for the payment of the interest accruing semi-annually on the "Dresden bonds."

Your Honors will now see the exact state of affairs at the time this act of 1865 was passed. The road had become largely and hopelessly indebted to the State, to such an extent that the State could not expect to receive repayment of its bonds, or by a sale realize a sufficient sum to satisfy its claim. An arrangement was therefore made by which the road was put in charge of a State officer, (the Fund Commissioner,) and at was arranged that all the gross earnings of the road, as daily received, or such as should originate from any source whatsoever *connected with the road*, were to be then taken possession of by the Fund Commissioner. Those funds were to be used:

First, to pay the operating expenses of the road; *second*, the salary of the Fund Commissioner; and the *third* use of the income was to pay the semi-annual interest on the

"Dresden bonds" and complete the construction of the road. He was then to proceed to apply any surplus that should remain in payment of the debt of the State.

Under these circumstances the act of 1865 was passed, by which the State consented that a portion of its own claim might be conveyed to the County of St. Louis. For what? As interest on $700,000 of mortgage bonds. To be used for what purpose? *For the completion of the road*—the very purpose that had been provided for in the act of 1865 (and here is the equity of the case)—the very purpose that, even as against the holders of the "Dresden bonds," the Fund Commissioner had the right to apply the proceeds; for the Dresden bonds were not to be paid *until the road was completed.*

It was thought advisable to obtain immediate aid from the County of St. Louis for that completion. That the loan was clearly made for the purpose of the *completion of the road* and for no other purpose, fully appears from the record.

The application made by the Pacific Railroad to the County Court of St. Louis County, December 23, 1864, was as follows:

"At a late meeting of the Board of Directors of the Pacific Railroad, the undersigned were appointed a committee to confer with your honorable body in relation to the present condition and prospects of the Pacific Railroad, and to ask the aid of the County *in completing this great work.*" (Page 62 of record.)

The records of the County Court of December 29, 1864, show the following:

"The court this day takes up the application of the Pacific Railroad for the issue of $700,000 of St. Louis bonds *to aid in the completion of said road.*" (Record, page 63.)

The bill of complaint in the case of Murdock & Clark *vs.* Woodson, duly sworn to was offered in evidence in this case. (The case is reported in 22 Wallace, 351.) The bill of com-

plaint in that case sets forth that the road was built and that the lien of the County of St. Louis proved insufficient to pay for such extension, repairs and equipments as were rendered necessary. (See Master's report, Record p. 76.)

It clearly appears in evidence, and there is no dispute that the road borrowed this money from St. Louis County for the completion of the road, and for no other purpose. It clearly appears from the evidence that it did not borrow any larger sum than was necessary *for the completion of the road.* It is apparent by reference to the act of 1864, that the State and the Pacific Railroad Company had the right to agree that the earnings of the road should be used for this purpose.

Reference to these material facts, which appear in the public acts of the State of Missouri, render easy of solution all questions as to the nature of the lien given the County, they show upon what property the lien was to attach, and make clear the intent of the Legislature in passing the act of 1865.

The view of this case which I am endeavoring to present is the same as was entertained by Judge Dillon, in his very able opinion delivered upon overruling the demurrer in ths court below. In that opinion he says:

"*It is not necessary to go into the general learning on the subject of equitable liens or charges, since the rights of the parties in the case before us essentially depend upon the construction of the act of* 1865.

"But the accepted doctrine of courts of equity in respect to equitable liens or charges will be found, we think, to support the conclusion we have reached. The cases clearly establish this legal proposition."

I do not deem it necessary to discuss in this argument, or refer to, the authorities which have been cited. I do not apprehend this Court will find that they have any application to the questions presented by the record.

The main question is whether this lien, which was *created by the authority of the State*, was of such an extent and nature

as to extend to the *income derived from the property* then owned by the corporation whose corporate name and *property* were *both* then designated and *described* as the "Pacific Railroad." This term being used as frequently to *describe* the *property* as to *designate* the *corporation*. Separated from the property there was no real value attaching to the Corporation. Can it be the Legislature of Missouri intended anything so farcical as a lien upon a naked corporate existence? We contend not; and if this construction is found by this Court to be the true construction of the act of 1865 there is no necessity for considering the propositions which were here presented and contended for yesterday by appellant's counsel or to examine the authorities claimed to support those views.

I am willing, for the purposes of this case, to concede, in answer to Mr. Day's proposition, that if a locomotive was sold, and thereafter ceased to be used upon the road, this lien would not attach. Why? Because it would cease to be "*connected with the road*," and the act of 1864 defined the fund upon which the County's lien was, by the act of 1865, to be the income derived from everything *connected with the road*. If a thousand tons of old rails were disposed of, the lien would not follow them, because they would *cease to be connected with the road*.

The Legislature evidently thought that it sufficiently protected the County of St. Louis, when it made it the duty of the Fund Commissioner in the first instance, and further imposed a statutory obligation upon whomsoever thereafter might have this fund—derived from operating the road, and from all sources connected therewith—to make perpetual payment to the County, of its interest, until its loan in aid of the road's construction was repaid.

It is not denied that the State of Missouri had the power through its Legislature, with the expressed assent of the Company, to direct such a disposition of the funds derived from the use of the properties of the Pacific Railroad; as

we contend were made. The State had power to declare by legislation that a certain sum should be paid annually by the Pacific Railroad for taxes, in lieu of any other assessments, unless it might be objected to on the ground of inequality. Let us then suppose, for the sake of the argument, that an act of the Legislature had declared that in lieu of all other taxes, a certain sum should be paid perpetually by the Pacific Railroad, and use the name or description here used, would it be contended because the management of that property was changed from its original possession and ownership to a successor, that thereby it became relieved from the tax imposed? Surely not.

The same quality of lien, that the State had in 1864 secured to itself, was, by the act of 1865, given to the County of St. Louis upon everything connected with or appertaining to the property known as the Pacific Railroad. No other view of this case can be maintained from the facts disclosed in the record.

The County was induced to loan this money by reason of the security thus proffered. That was the inducement of the loan. As I have shown from the records, the judges of the county court were importuned by the Railroad Company and urged to make the loan, and it is evident from the facts, to which Mr. Phillips called your attention on yesterday, that their intention was to obtain a security. They declined to make this loan without a security. They obtained that which the attorney, representing the property to be charged, assured them was a good security. This is clearly stated in Mr. Leighton's opinion, and the county judges adopted his view. The property had little or no value, except its producing capacity through its earnings. The County, therefore, said "We will obtain priority over the State, upon the earnings; for this act of 1864, provided that the State bonds shall be paid off from the income of the road." The State, by the act of 1865, relinquished its right in that regard, to an extent sufficient to secure the

interest upon the County's bonds. The operating expenses were to have priority, and the interest on the Dresden bonds was to have priority. This was comparatively a small amount upon so large a property. The Fund Commissioner's salary was to have priority. The County said, then, that "we will be paid next;" and they are assured of this payment by the power of the State. It is guaranteed to them by an authoritative act of the Legislature of Missouri. The State of Missouri acted in a double capacity in passing this act of 1865, as a *contracting party* and as *sovereign law-maker*.

It needs not that we should inquire beyond that act, if we have given to it the proper interpretation. It gave full legal authority for taking security, in the prescribed form and manner, by the act designated.

The CHIEF JUSTICE.—As I understand the case, upon your view of it, it stands in this way: The State had a statutory mortgage upon the property as security for the payment of its loan. Pursuant to the authority contained in that mortgage it had taken possession of the road and was operating it. It operated it under the security, or by reason of the lien it had upon the property, and the authority of the mortgage. It appointed a Fund Commissioner for the purpose of receiving the earnings of the road, as its agent, holding under that mortgage, and it provided for the manner in which he should pay out the earnings of the road so long as he held them. Suppose, now, that debt had been paid off: where is the obligation resting upon any one by law to receive and pay over the money to these parties?

Mr. BOWMAN.—The additional fact should be called to the Court's attention: While this act of 1864 was a taking possession by the State of this road, its property, and of its income, *it was done with the assent of the Railroad Company*—the Railroad Company formally accepting the provisions of the act of 1864.

That act gave large concessions to the Railroad Company,

to wit: it postponed (as I shall attempt to show in my argument, if time permits) by that act of 1864 the payment of the State bonds, and provided for their payment from the income of the road. Time was thus given until the road could pay them; and the terms of the act of 1864 being formally accepted by the Pacific Railroad, constituted a contract of extension.

The act of 1864, accepted by the Pacific Railroad Company, provided that the trust in the Fund Commissioner *was to continue until the seven million dollars had been repaid the State from the income of the road*, and it should be discharged from the debt. This was expressly provided in the second section of the act of 1864. After the whole debt of the State was paid from the income of the road, the County's claim would be safe; and it will be remembered that the State bonds, as disclosed by the record, were to run for a period exceeding the length of time the County bonds were to run. There were State bonds then upon the road which would not be due for over twenty-five years from that time.

That being the case, this Fund Commissioner could not be got rid of, but was to be continued, and it gave, for this reason, absolute security to the County's interest.

When the State was paid off from the earnings of the road, as was agreed the whole seven million dollars then due the State, the property must necessarily be of such value that the County could enforce the payment of its sole remaining debt of $700,000 against the Company.

Therefore, from every business point of view from which it could be looked at, it was a perfect security. There was no contingency to defeat it, except they ceased to operate the road and abandoned the right of way, leaving but a streak of rust.

But we are told that the provisions of the act of 1864 have been repealed—repealed by the consent of the Pacific Railroad, and repealed by the State, and the office of the Fund Commissioner has been abolished. But, mark you,

without the assent of the County and tax-payers of St. Louis to such repeal. The County gave no such assent. There was concededly a contract with the County, and this contract the State had no power to invalidate, as against the interests of the County, or lessen the security.

If the act of 1868 had lessened the security of the County, by abolishing the office of the Fund Commissioner prior to the time to which it was agreed that it should continue, as provided in the second section of the act of 1864, it would have been in violation of that contract, and void as against the County.

But we do not contend that it was thus void. We contend that the act of 1868, that set aside the act of 1864, was not void, for it was assented to by the Railroad, and done by the State, and the consent of the County of St. Louis was not necessary, if our position is correct. For, if our position be right, that this right of the County attached to that property, in whosesoever hands it was, it did not make any difference whether the office of the Fund Commissioner was abolished or not.

The CHIEF JUSTICE.—Do you claim, if the debt had not been paid off by the income of the road before the maturity of the bonds, that the State could not, when the bonds matured, have foreclosed its mortgage and enforced payment?

Mr. BOWMAN.—It is perfectly apparent, from the act of 1864, that they waived their right of foreclosure, and substituted therefor payment of income.

The CHIEF JUSTICE.—That is your construction?

Mr. BOWMAN.—It is; and the provisions of the second section of the act of 1864, to which I will now invite the attention of the Court, are clear and explicit. It provides:

"The office of Fund Commissioner is hereby created *and shall continue until the bonds issued for the completion of the road, and the State bonds loaned to said Railroad Company, with interest thereon, are fully paid out of the earnings*, or exchanged for

the first mortgage bonds of said road, as hereinafter provided."

The last clause is immaterial, as no bonds were so exchanged, and no such exchange would have been assented to unless the road became solvent, and then St. Louis County would have been secure.

That act of 1868 was passed, as we say, legally and properly, because it did not interfere with the rights of the county, and was assented to by the company by its purchase of the State's lien thereunder.

Three modes of foreclosing or disposing of the State's lien were provided for in the act of 1868:

1. One mode was to put the property up at public sale to any party who might bid.

2. The second was that the State should bid $8,350,000, if no one bid more, and should immediately resell the road.

3. The third mode was that as they might not release the lien, it being forbidden by the constitution, yet as this Court has held, in case of Murdock *vs.* Woodson, *they might sell the lien of the State to the Pacific Railroad itself.* That is what was done. There was a sale made of the lien to the company.

In that act of 1868 it was carefully provided that if the State became the purchaser, it should pay St. Louis County the $700,000. It is further provided that if any other purchaser bought the road, he should pay the county $700,000. If the State's lien was sold under the fifth section of the act of 1868 to the road itself, there was no provision in the act of 1868 as to the County's lien.

Why was that? Why was it that it was thus carefully provided in the other contingencies for the payment of the county, and yet nothing was said in case it sold the lien of the State to the road? The answer is perfectly plain, if we

have given the proper construction to the act of 1865, as was suggested by my associate counsel yesterday, Mr. Phillips, when this act was first presented before the County Court, the clause was simply that the Fund Commissioner should pay, &c. Afterwards the Legislature, before the final passage of the act, inserted these words: "*or such persons as may, at any time thereafter, have the custody of the funds of said railroad company.*"

Now if the State had, by an authoritative act of the Legislature, previously provided for, and made it obligatory upon any and all persons who might thereafter have in charge the same funds that were then made payable to the Fund Commissioner to continue the payments to the county, then the county could not be effected; but if a sale under the State's mortgage of 1851 actually took place, it would, to say the least, cast a shadow upon the claim of the county. But if this interpretation that we here contend for of this language, is not the correct one, then the State perpetrated a gross outrage upon the county by lessening the security, and has clearly violated the obligations of the contract made under the act of 1865. This the State had no power to do; it could pass no law impairing the obligations of a contract between private parties, much less as between private parties and the State itself. This position is fully sustained in Cooley's Constitutional Limitations, page 273, cited on page 13 of printed brief. It will be observed that the Legislature made like provision for a *portion only* of the floating debt, viz: that portion that was believed entitled to a lien not inferior to the State's lien. (See Record, p. 76; on printed brief, page 3.) It is evident the State did not intend to disregard the rights and equities of private parties in passing the act of 1868.

The Fund Commissioner was, by the sovereign power of the State of Missouri, properly exercised—first, charged with the distribution of a particular fund, and directed to make certain payments therefor to the County of St. Louis.

Could not the State impose a like obligation upon any citizen of the State into whose hands the fund might thereafter come? We contend certainly that there was this power. The State exercised its sovereign power, and delegated and made obligatory the carrying out of that trust; not only upon the Pacific Railroad, who then next assumed to receive the fund, but it has been made equally binding upon the successor corporation now operating that road, and will continue a charge upon the funds of the road until the admittedly just debt is fully paid.

Clearly this was the intent of the Legislature, and of the parties to this statutory contract. And if this Court should be satisfied that that was the *intention of the parties*, it remains but to affirm the decree of the court below.

There are two subdivisions of this case as presented in the opening argument on behalf of the appellant, that deserve notice.

The one is that the lien ceased when the office of Fund Commissioner was abolished.

It would follow, then, that there was no longer any claim as against the Pacific Railroad corporation itself, although a party to the contract. If this be the correct view, the $41,000 that has been paid the county under the decree of the court below, from earnings of the property of the railroad before the transfer, which payment was made subject to the final decision of this case, would have to be refunded, and the fund that still remains undisposed of, instead of being applied, as we contend it should, in payment to the county for the months of April, May, June, July, August, September, and October, 1876, while the road was in the hands of the court's receivers, would be payable to the road or to the third mortgage bondholders, if Mr. Day is right in his view of the matter.

It will be observed that by the order of the circuit court, on October 12, 1876, the receivers were directed to reserve in their hands, subject to the final decision of the case, a

sufficient fund to pay the $4,000 per month to the county for the period during which they operated the road, and if this decree is affirmed, then the county receives from the funds thus reserved by this order, for the payment of the county's interest, the amount that has been thus reserved for its use. (Record, p. 46.)

If the learned counsel of appellant who made that portion of the argument is correct in the position he assumed as to this branch of the case, then the Pacific Railroad could itself violate its own obligations with impunity, it is certainly a most remarkable proposition, for, mark you, this fund had accrued from the earnings before the transfer to the successor corporation. They are seeking to divert the funds prior to the time of the sale. Under what principle of equity or law can such a view be sustained? Clearly none.

But if this Court finds that it was the intention that this lien should attach to all the property known and described as the Pacific Railroad, and that everything connected with that road, so long as it continued to be used for such purposes, and not to a valueless naked corporate existence, then it is clearly immaterial whether the funds are received by the Fund Commissioner, by the Pacific Railroad of Missouri, or the Missouri Pacific Railway Company, (as the new corporation is now termed,) *they are all subject alike to the sovereign power of the State of Missouri.* The State of Missouri has created each of these corporations, and has the right to impose upon them the execution of the trust created for the county's security. It has done this by apt words in the act of 1865, and enforcement should be given thereto.

A question has been made here as to the impossibility of the separation of the funds, and it has been contended that the accretions to the road were not subject to its original lien.

It is wholly unnecessary, in view of the facts disclosed in the record, to discuss such a question. $10,000,000 of the

bonds of the State and stock subscribed by St. Louis and other counties, as shown by my associate in his opening remarks, had been appropriated and already used to build the road. The earnings of the property already acquired were abundant for the purpose. As will be seen by facts cited in my Brief, page 31, there is no question of separation involved, and none can arise.

Had time permitted, I would have read to the Court the views of my associate counsel in response to questions submitted yesterday. He has reduced to writing his views, in response to those questions, and I will ask permission to hand them in printed form to the Court.

The CHIEF JUSTICE.—If there is no objection on the other side we will receive it.

Mr. BOWMAN.—With these remarks I submit the case, regretting that the necessary shortness of time allowed does not permit that I should attempt a review of the historical facts connected with the case, which so fully support the claim to an *equitable* lien. I ask the attention of the Court to the review of the facts as set forth in the printed Brief I have submitted, and particularly to the very able opinion of Judge Dillon, given at the time of overruling the demurrer, when the case was argued at great length and carefully considered. I have been requested by Mr. Bell, the city counsellor, who is here present, to present for filing a written stipulation which has been drawn and signed, I believe, by all the counsel in the case, to the effect that if this Court affirms the decree of the Court below, the city of St. Louis, as the unquestioned successor of the County of St. Louis to the funds, may be substituted.

I respectfully submit that the decree of the Court below should be affirmed.

REPLY OF HENRY A. CLOVER

TO

QUESTIONS OF THE COURT.

Objection is made to the decree in this cause, not as to the mere form of it, but as being unwarranted by the evidence.

The decree declares the County of St. Louis entitled to an equitable lien or charge upon the EARNINGS of the said Pacific Railroad, to whomsoever the same may be transferred or conveyed, prior and paramount to any other mortgage.

The said equitable charge is decreed to exist and be enforceable on said EARNINGS OF SAID RAILROAD PROPERTY.

2. It is objected that it is utterly impossible to discover to what the so-called equitable lien attaches under the decree.

It is said, the decree contemplates an equitable charge upon the earnings of the corporation—the Pacific Railroad —without reference to, and apart from the property of the company.

It is said the decree, as well as the intervening parties, give no intimation as to the earnings of what specific railroad property is referred to.

Nor need it. It means what it says—upon the earnings of the railroad property, not specifying in detail, but declaring upon the earnings of the railroad property—all the railroad property.

But it is again stated this is not warranted by the provisions of the act of 1865 under which the claim of equitable lien or charge is asserted. It is said this act speaks of pay-

ment out of the earnings of the Pacific Railroad—that this *means* the earnings of the Pacific Railroad as a *corporation*, and *not* the earnings of the property of the corporation: and that argument could not be required to show—to demonstrate—the distinction between the earnings of an *individual*, and the earnings of *the property* of an individual—the earnings of a *railroad corporation*, and the earnings of the *property* of a railroad corporation.

The answer is—there could and can be no earnings of a railroad corporation separate and apart from its property. THE CONCEPTION IS IMPOSSIBLE. But blended with this idea—is the other idea—I say blended because not boldly put forth, that as long as (so long as) the property remained the property of the corporation, an equitable charge existed,—the mortgage existed: but so soon as the property changed ownership, the mortgage ceased to exist. This idea is couched in this language:

"If then the county acquired a lien (mortgage) upon the earnings of the corporation (the words property of the corporation are dropped out of consideration,) the Pacific Railroad, it is evident that there was nothing to which that lien could attach at the time the intervening petition was filed, or the decree made, or at any subsequent period."

Why? Because the property did not belong to the Pacific Railroad: it had been sold to another corporation.

The property, however, had not, has not, ceased to exist: but why is it said that there was nothing to which the lien could attach at the time the intervening petition was filed—20th April, 1876, (the date of sale of property was 6th September following,) because I suppose the answer to be, there was not any specific funds on hand at a particular day.

When on a particular day the Fund Commissioner had funds in hand, there was an equitable charge upon the earnings existing; when on a particular day there happened to be no funds *in hand* there was no equitable charge existing upon the funds of the road in hands of the Commissioner; there was no equitable charge existing upon the earnings. This is the argument.

The whole argument is reasoning in a circle, thus: the mortgage is upon the *earnings of a corporation*—something apart and distinct *from the earnings of the* PROPERTY of the corporation; but if the mortgage is upon the earnings of the corporation, then the mortgage ceases to exist when the corporation has sold its property to a third party.

This leads up to the examination of the propriety of that portion of the decree which declares the charge to exist not only upon the earnings of the property of the Pacific Railroad at the time the corporation remained the owner of the property, but whilst the earnings of the property came to whomsoever the property might be transferred or conveyed; and this is the question to which counsel was invited on yesterday to address attention.

Then—was it the intention of the parties, that an equitable mortgage—that a lien—that a charge upon the income—the earnings of the property of the company, the Pacific Railroad, to the extent specified should exist so long and no longer as the property out of which earnings grew, should continue to be the property of this *particular* corporation? Whatever the *intention of the parties*, this Court will give effect to that *intention* so far as no principle of law is violated thereby. What law? The law of the State where the contract was made, a law made by the State itself and assented to by the other parties—citizens of the same State, the Corporation and the County in this instance. Therefore it is wholly unnecessary to look to the general principles of the

law of Missouri relating to the doctrine of equitable liens or mortgages, for *the case stands upon a special law*. If that law of itself, intended to create and created, when accepted by the parties interested, a mortgage upon the earnings of the *property* to secure the loan, and which the parties so understood, then the rights of the parties essentially depend upon the true construction of the act of 1865. There is no question how one of the parties understood it—and that the Pacific Railroad Corporation.

The Master reports that that company for the purpose of influencing the County *as to the true meaning of the law*, gave its declaration to the County that when it, the Corporation, had expressed its assent to the law, if also accepted by the County, there would thereby be created *in favor of the County* an *equitable lien or charge upon* the earnings of the company *pro tanto* to the extent specified.

Did St. Louis county so understand?

I endeavored, on yesterday, to show that the previous relations of the parties to each other would not bear the idea that the county would loan without full security.

What was the intention of the General Assembly? Did that body intend by the passage of the act of 7th January, 1865, the Pacific Railroad might pledge the earnings of the *property* of the corporation for a loan by the county of $700,000, the relations of debtor and creditor between the parties being well understood by the Legislature, and that the next day after the loan was made under the act the Company corporation might convey all its property to other parties, and the mortgagor road, having no other property whereby earnings could be made, thereby utterly defeat and destroy the security for the loan.

A careful examination of the act of 1865, and in view as shown by there cord, of the circumstances attending the passage of the law, will demonstrate that the General As-

sensibly entertained no such idea, but intended to create a *perfect security for the loan.*

If I am right herein, we have thus the intention of all the three parties clearly shown.

Why will not this Court give effect to such intention?

What stands in the way? The purchaser as we have established, I think, was a purchaser with notice. If the Fund Commissioner, Judge Dillon, in his opinion, most ably and forcibly asks, was still in esse, and in receipt of the earnings of the road, can it be doubted that at the instance of the County he could be compelled by *mandamus* or other proper proceedings to pay the specified sum of each month into the county treasury?

What, he asks, has changed the rights and relations of the Company and the County?

I ask, *what has the county done whereby it has lost the right which it once undoubtedly possessed to a share of the earnings of the property of the company?*

Did the act of the General Assembly of 1888 do it? The County had naught to do with the passage of the act.

The act itself shows a proper solicitude on the part of the General Assembly to protect and to preserve the interests and rights of the County.

It had intended, in abolishing the office of Fund Commissioner, *to destroy the vested rights of the people of the County in the vested security.* It (or we could deny it power to do it did not do so, however, and that in the act of 1885, expressly provided that it, or any case, the Fund Commissioner should cease to be, that he to whom, at any time hereafter, the custody of the funds of the railroad should come, should do as he, the Fund Commissioner, was required to do.

Of this the third mortgage bondholders, complainants in this cause, had notice and knowledge.

On every principle of justice and law, the money of the

County, which went to the preservation and salvation of the road, by which it existed and has continued to exist and wax until this hour, is an equitable charge upon the earnings of the *property* of the then corporation until the maturity and payment of the principal and interest of the bonds.

Respectfully submitted by

HENRY A. CLOVER,
Of Counsel for Respondent.

Supreme Court of the United States.

GEORGE E. KETCHUM, *et al.*, *versus* THE PACIFIC RAILROAD (of Missouri). COUNTY OF ST. LOUIS, Intervenor, *et al.*	*October Term*, 1879. No. 162.

Now comes the Pacific Railroad and moves to dismiss the appeal taken as No 162 *the above entitled cause for the reasons below shown and also in the Brief of* N. A. COWDREY, *et al., Solicitor for Pacific Railroad in No.* 242.

KETCHUM, a holder of ten bonds under deed of trust made by Pacific Railroad to Fish and Vail, Trustees, commenced suit of foreclosure November 11th, 1875.

The suit was prosecuted to decree and sale of mortgaged premises.

Decree of sale was entered June 6th, 1876.

The premises were sold by the Master, September 6th, 1876.

Sale was confirmed 6th and 24th of October, 1876.

The decree provided that if the premises were purchased by the bondholders, any holders of said bonds might at any time within sixty days after the purchase, become associated inthe purchase in proportion to the bonds held, with the same right, and subject to the same burdens, and under the same scheme as the original purchaser had or proposed. (Record, p. 28).

The premises were purchased by James Baker for the bondholders. (Record, p. 34). The whole number of bonds claimed to have been issued was 4,000 of $1,000 each=$4,000,000. Baker paid as part of the purchase money 3,948=$3,948,000, leaving $52,000 outstanding, and gave a bond for performing the conditions of the decree and of the purchase. (Record in No. 242, p. 57).

The record does not show that the holders of the $52,000 of bonds came in and participated; they had sixty days thereafter so to do. It is assumed that they did come in.

All of the complainants, Ketchum, Garrison, Seligman and Pierce joined in the purchase, and surrendered their bond—Garrison joined in the bond given by the purchaser. (Record, No. 242, p. 57).

The decree was without prejudice in any manner to the claims of the County of St. Louis, to a lien on the property and franchises of the Pacific Railroad, as set forth in its amended petition claiming a lien for $700,000 and interest. (Record, p. 29).

The County of St. Louis at an early stage in the litigation, viz., April 25th, 1876, intervened as a stockholder of the Railroad Company. (Record, No. 242, p. 24).

The County, on the 6th of June, 1876, the same day the decree of sale was entered, took an order on its own motion dismissing its intervention as a stockholder without prejudice to its claims as a lien holder. (Record, No. 242, p. 41).

The County of St. Louis, on the 20th day of April, 1876, filed an amended intervening petition, (Record, p. 37,) against the Pacific Railroad. The only party to this petition and the only one against whom any relief was prayed for, was the Pacific Railroad, (Record, p. 42, 16*th paragraph*).

The complainants without naming which or who demurred to the petition. (Record, p. 44.) The demurrer was held to be not well taken, and the complainants without being named had leave to answer. (Record, p. 45).

On the 15th day of January, 1877, *three months after decree had been executed, and all complainants' demands satisfied*, Geo. E. Ketchum, James Seligman and Thomas W. Pierce *as complainants*, the Atlantic & Pacific Railroad Company as guarantor of certain indebtedness of the Pacific Railroad, *which debt had been satisfied in the same manner by the purchase at the foreclosure sale*, Uriel A. Murdock and Luther C. Clark, (Clark had been dead nearly one year, James D. Fish and Henry F. Vail, (Fish and Vail were the Trustees of the mortgage satisfied by the sale,) Edwin D. Morgan, Jesse Seligman and James Baker, claiming to be parties in interest herein, filed an answer to the Petition of Intervention by the County of St. Louis, (Record, p. 46,) wrongfully calling themselves respondents, in which they denied that the County of St. Louis had any lien on the premises.

The issue so made was decided adverse to them; judgment entered accordingly. (Record, p. 81).

From which judgment, the respondents, (without naming them,) took an appeal to this Court, and gave the supersedeas bond of Andrew Pierce, A. V. Stout, J. Seligman and Russell Sage, no one of whom was a party to the suit.

I.

The Pacific Railroad moves to dismiss the appeal because of a want of proper parties thereto.

1st.—The only parties to the Bill of Intervention were the Pacific Railroad and the County of St. Louis. The only relief asked was by the County against the Pacific Railroad.

It is true that if the County of St. Louis set up claims injurious to the rights of others, the parties so injured might have intervened; not by answer, but by cross bill, or petition to have been made parties; no person or parties did so intervene.

As a matter of fact, the only persons who could have so intervened at the time the petition was filed, was Fish and Vail, Trustees of the mortgage—being foreclosed—and on which the Court had adjudged there was something due from the debtor to some of their *cestui que trust*.

Neither said Trustees or any of their *cestui que trust* did intervene.

The claims of said Trustees and of their *cest que trust*, were satisfied by a purchase of the mortgaged premises made by them September 6th, 1876, and confirmed by the Court, October 6th and 24th, 1876.

2d.—The remaining so-called respondents were mer *volunteers*—interlopers in the proceedings—without the slightest interest in the questions before the Court. No interest is shown by their answers to the intervening petition.

3d.—To be a party to the suit, or to be allowed to take an appeal to this Court, the appellants must be parties to the record, and have a direct interest in the question; they must be aggrieved by the judgment of the Court below. The interest in the case and the injury sustained, must be shown on the record.

4th.—It is not argued here that Baker or his successor in the purchase—the Missouri Pacific R. R. Co.—might not have come into Court on petition, showing their subsequently acquired interest, and have been allowed to defend and to appeal. *It is only shown that they did not do so.*

Baker only retained title long enough to transfer the same to his successor, the Missouri Pacific R. R. This latter corporation nowhere appears in the record. It might have done so; it has not.

5th.—The County of St. Louis has been delayed in collecting its just debt since the rendition of the judgment of the Circuit Court, viz: March, 1877,

and is entitled to ten per cent. damages under Section 1010 of Revis. Stat., U. S., and the 23rd rule of this Court, as against George E. Ketcham, C. K. Garrison, James Seligman, Thos. W. Pierce and James Baker, parties who took the appeal, but not as against the Pacific Railroad, for it took no appeal, and has always been willing to pay the debt.

91 U. S. 357. *Amory vs. Amory.*
99 U. S. 606. *Whitney vs. Cook.*

II.

Because that the Circuit Court had no jurisdiction of the controversy, for that the parties to the controversy are both and all citizens of the State of Missouri.

Eliminating the volunteer parties who had no interest in the pending question, the actual remaining parties to the controversy were:

The County of St. Louis, affirming it had a lien on the property of the Pacific Railroad—and the Pacific Railroad, which was silent—it made no answer because it desired the Court to apply the income of the Road to the payment of its debts. Its income was and is very ample for that purpose. The County of St. Louis and the Pacific Railroad are both citizens of the same State, viz., the State of Missouri, this is shown by the *record* p. 2-37.

The successor Railroad Company which had purchased the premises might have come in and defended against the claim of the County; it did not do so; if it had, that fact would not have altered the question of jurisdiction.

III.

The appeal should be dismissed with costs. The judgment below affirmed and ten per cent. in addition to interest awarded under the 23d rule to the appellees, of whom the Pacific Railroad is one.

PACIFIC RAILROAD (OF MISSOURI,)
By its Solicitor, N. A. COWDREY.

Supreme Court of the United States.

OCTOBER TERM, 1879.

No. 162.

GEORGE E. KETCHUM ET AL.,
Appellants,

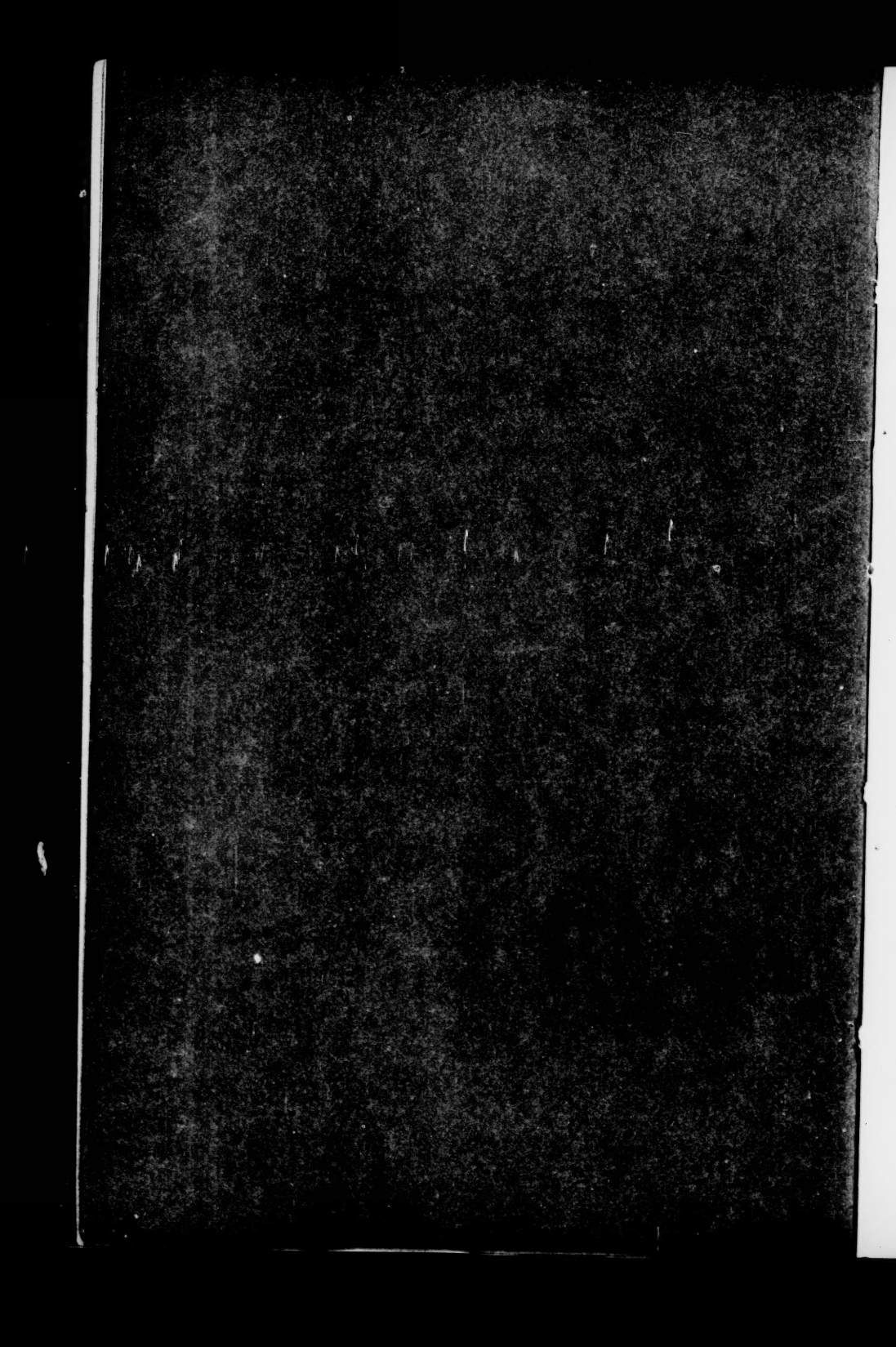
vs.

THE COUNTY OF ST. LOUIS,
Intervenor, Respondent.

LAWS OF MISSOURI.

Act of February 10th, 1864.
Act of January 7th, 1865.
Act of March 31, 1868.

Judd & Detweiler, Printers, Washington, D. C.



LAWS OF MISSOURI.

AN ACT for the extension and completion of the Pacific Railroad to the western boundary of the State at Kansas City, and the North Missouri Railroad to the Iowa State line; to complete the Southwest Branch of the Pacific Railroad, and to reduce the State indebtedness.

SECTION

1. Pacific Railroad authorized to borrow money; bonds may be issued; conditions of bonds; *proviso* about sale of bonds; State lien relinquished on certain part of the road; how net profits to be applied; *proviso* about sale of road; *proviso* about State's right to redeem said road.
2. Fund Commissioner established; how long to continue; Governor to appoint a Fund Commissioner; to be confirmed; to give bond; where bond filed; may be dismissed; salary fixed; to file monthly account of expenses in Secretary of State's office; this act to be submitted for acceptance in sixty days; proceedings on being accepted; proceedings on not being accepted.
3. Pacific Railroad to deliver to Fund Commissioner its bonds; denomination of bonds; Commissioner to negotiate said bonds; where funds to be deposited: how drafts to be indorsed; interest to be drawn on deposits; failure to deliver bonds, what forfeiture.
4. Commissioner to use funds in constructing the road; how payments to be made.
5. Directors to be classified; term of each class; qualifications of directors.
6. Mortgage bonds may be issued; conditions of bonds; how executed; how secured and how sold; proceeds, how used; when main line of road may be sold; minimum price not to be below a certain amount; proceeds of sale, how used; notice of sale; obligation to issue bonds imperative.
7. Net earnings of road, how applied; Commissioner to examine books and affairs of the company; report to Governor condition of things, if bad.
8. Bondholders of Missouri bonds may make certain investments; road may enlarge capital to a certain extent; certain stocks preferred in payment of dividends; State lien, how far released.
9. Superintendent to provide pay-rolls and furnish Commissioner with same; monthly reports to be made.
10. Contracts for work to be advertised; proposals to be recorded; who entitled to contract; how many miles one contractor may have; fifteen per cent. of contract price to be retained, when.
11. Railroads to accept or reject this act; proceedings in such case.
12. Chariton and Randolph and Missouri Valley Railroad Companies may transfer all stock, etc., to North Missouri Railroad; when so so done, what name shall assume; franchises vested to be considered transferred; nature, amount, condition, etc., of bonds to be issued

by North Missouri Railroad; no lien created on West Branch for liabilities of North Missouri Railroad; one road not liable for the other.

13. North Missouri Railroad may issue bonds; what for; condition, nature, amount, etc., of bonds; how proceeds applied; certain sections to apply to the North Missouri and West Branch Railroad; intent of act stated.
14. Certain roads may form a connection; may condemn right of way.
15. Pacific Road to construct Southwest Branch; sell lands donated; to be completed to certain point in fourteen months.
16. Pre-emption right reserved to certain persons; price to be paid for lands hereafter.
17. Notice to be given for land purchasers to pay up, when; failure to pay forfeits right to purchase.
18. Acts contrary hereto repealed.

Be in enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. The Pacific Railroad Company is hereby authorized to borrow money for the completion of the main road to Kansas City, and for this purpose may issue not more than one thousand five hundred bonds, of one thousand dollars each, bearing interest at the rate of not more than seven per centum per annum, with coupons attached, and having four, five, and six years to run, in equal proportions; said bonds to be secured by a first mortgage on the main line of the road west of Dresden, and as much of the proceeds of said bonds as may be necessary shall be applied to the completion of the road from its present terminus to Kansas City, and to no other purpose; said bonds shall only be negotiated or sold as the money is required for the payment of work done or under contract. *Provided, however,* That all of any one class of bonds may be sold at one time; and the State of Missouri, for this object, and to this amount and extent only, hereby relinquishes her first lien and mortgage and right of forfeiture upon said road west of Dresden, retaining, however, a second lien and mortgage thereon, such second lien and mortgage to become forthwith the first lien and mortgage in every respect, and as fully as now held by the State, upon the payment in full of principal and interest of the bonds authorized by this act. All the net profit sof the road shall be applied to the extension and equipment thereof until completed as aforesaid, reserving, however, sufficient for the payment of the interest accruing semi-annually on said bonds actually sold, and after completion of the road any surplus over the accruing interest

shall be applied to the purchase or payment of the bonds themselves: *Provided*, That no sale of the road west of Dresden, as aforesaid, or any interest therein, or therewith connected, on account of the non-payment of such interest or principal, shall be made before notice in writing of such failure has been first given to the Governor and Secretary of State, and until twelve months shall have elapsed after such notice, before such sale. *And it is further provided*, That the State, through the Governor or any agent appointed by the General Assembly of the State, shall have the right to redeem said railroad from any sale under the provisions of this act by the bondholders or mortgagees, or buy in the same at any such sale; and upon the payment, or tender of payment, of the amount of such mortgage, with interest, by the State, all the rights and privileges of the Pacific Railroad Company in and to said railroad, depots, lands, rolling stock, machine shops and other appurtenances, shall be vested in the State, and the Governor of the State shall take possession of the said road, without any suit or sale.

SEC. 2. The office of Fund Commissioner is hereby created, and shall continue until the bonds issued for the completion of the road, and the State bonds loaned to said railroad company, with interest thereon, are fully paid out of the earnings, or exchanged for the first mortgage bonds of said road, as hereinafter provided. It shall be the duty of the Governor to appoint a Fund Commissioner, subject to the approval and confirmation of the Senate, at this or the ensuing session of the General Assembly, who, before entering upon the duties of his office, shall file in the office of the Secretary of State a bond for the faithful performance of his duties under this act, conditioned according to law, to the State of Missouri, in the penal sum of not less than one hundred thousand dollars, the securities wherein shall be first approved by the Governor. The salary of said Fund Commissioner shall be four thousand dollars per annum, and shall be in full compensation for all his services. The Fund Commissioner may be dismised by the Governor for any malfeasance in office, and all his official acts, the books, papers, and accounts of his office shall be at all times subject to his inspection and control. He shall file a monthly return of the receipts and expenditures of his office, in the office of the Secretary of State, showing the balance then on hand. Within sixty days from the passage of this act, the directors of the Pacific Rail-

road Company shall cause said act to be submitted to the stockholders thereof for acceptance, and if the same is accepted by a majority of the said stockholders in interest, the directors shall immediately certify such acceptance in writing to the Secretary of State: and in failure thereof, the Governor is hereby directed and required to proceed forthwith thereafter to the forfeiture and sale of said road, and fix a minimum price for which it shall be sold: *Provided*, That upon the sale of said road according to law, the price and sum for which the road shall be sold shall not be less than the amount of bonds and coupons issued to said road remaining unpaid: and if said sum is not realized by and at such sale, the Governor of the State shall, by himself or agent, buy in the same, for and in the name of the State of Missouri. In case such sale and purchase by the Governor in behalf of the State, he is hereby empowered and authorized to operate the road, in the same manner and with like authority as the president and directors of said road are now by law authorized, with such modifications and changes in the detail thereof as may be by him deemed beneficial to the interests of the State, until the Legislature shall make such provisions in regard to said road as in their judgment may be deemed expedient.

Sec. 3. The Pacific Railroad Company are hereby required to deliver to said Fund Commissioner, within a reasonable time after he shall be appointed and qualified, the bonds of the company hereby authorized to be issued, to the amount aforesaid, in bonds of one thousand dollars each, having four, five and six years to run, in equal proportions, and bearing interest at a rate not exceeding seven per centum per annum, with coupons attached, payable semi-annually at the Bank of Commerce in the city of New York: whereupon, in order to give validity to such bonds, the State relinquishes to that extent, and for that object solely, as aforesaid, her first lien and mortgage upon said road west of Dresden, as aforesaid. The Fund Commissioner shall thereupon proceed to negotiate said bonds, as provided in section one of this act, at such prices as may be obtained therefor, subject, however, to the approval of the Governor and president of the railroad company before such sale: the proceeds thereof shall be deposited in the Boatmen's Saving Institution in St. Louis, or such other institution or bank as the Governor may direct, subject to the draft of said Fund Com-

missioner, for the purpose of the completion and equipment of the road, in sums not greater than fifty thousand dollars at any one time, which draft shall be indorsed by the Governor before the same is paid: *Provided*, That said institution or bank shall pay on such deposits such interest as may be agreed upon. All gross earnings of said road, from all sources, shall be paid in daily to said Fund Commissioner, and all other sources of revenue, belonging to or connected with said railroad, shall be under his control, and be taken into his possession as they arise, and be deposited daily in the institution or bank aforesaid; and upon failure of said railroad company to pay said money to said Fund Commissioner, as herein provided, the said company shall forfeit and pay to the State of Missouri, for each and every such neglect or refusal, the sum of ten thousand dollars, to be recovered as other forfeitures.

SEC. 4. Said Fund Commissioner shall, out of all moneys arising from the sale of bonds, as aforesaid, upon proper vouchers, pay for the construction of the extension and equipment of said road, as aforesaid; and out of all other moneys derived from other sources, as before designated, in his hands and under his control, upon proper vouchers and receipts, he shall pay for the operating of the road; the payment for said construction and equipment shall be made upon the vouchers of the chief engineer of said road, approved and countersigned by the president, specifying in proper detail the amounts and character thereof; and the payment of operating the road shall be made upon the vouchers and certificates of the superintendent of the road, approved by the president and chief engineer.

SEC. 5. The Board of Directors shall classify themselves into three divisions, viz: the first, consisting of four members, to serve until the annual election of 1864, the second consisting of four members to serve until the annual election of 1865; and the third consisting of five members to serve until the annual election of 1866; and all annual elections are to be for four or five directors, to serve for three years, and to fill the places thus becoming vacated. The directors must be citizens of the State of Missouri, and have resided in the same at least three years. The directors shall elect their president and vice-president annually.

SEC. 6. It shall be lawful for the Pacific Railroad Company to issue first mortgage bonds, having not more than

twenty-five years to run from the date of their issue, and bearing interest at six per centum per annum, payable semi-annually, to the amount of the State bonds loaned to said main road, together with all interest due and unpaid; said mortgage bonds shall have the effect of first mortgage upon said road only to the extent of their exchange for bonds of the State, when the same are delivered up and canceled with unpaid coupons attached; these first mortgage bonds shall be countersigned by the Auditor of the State and delivered to the said Pacific Railroad Company, for a return to him of an equal amount of State bonds, including interest due and unpaid, with unpaid coupons attached. And the first mortgage bonds thus issued shall share in the security now held by the State in said main line of the Pacific Railroad, in proportion that their amount may bear to the bonds and coupons remaining unpaid, and which have been issued by the State for the benefit of the said main line; so that in case of the sale of said main line railroad, by default or otherwise, the proceeds of said sale shall be divided in proportion as aforesaid, between the State and the holders of said first mortgage bonds; and the holders of such first mortgage bonds, thus substituted, shall have no power, by virtue of such substitution, to cause the main line of said railroad to be sold under the first mortgage held by the State, except in pursuance of the provisions of this section. And whenever the amount of State bonds and interest coupons thereon shall be so exchanged for said first mortgage bonds, in the aggregate equal to three-fourths of the amount of the State bonds and interest coupons thereon outstanding and unpaid at the time of the passage of this act, and which may have been issued by the State for the benefit of the main line of the Pacific Railroad, the holders of said first mortgage bonds, after the fifteen hundred construction bonds, with interest thereon, authorized to be issued by the first section of this act, shall be fully satisfied and paid by said railroad company, shall have the right and authority, by virtue of said substitution, to sell said main line of the Pacific Railroad, rolling stock, franchises, and other property belonging thereto discharged from the mortgage lien of the State, if, after the payment, as aforesaid, of the said fifteen hundred construction bonds, the said Pacific Railroad Company shall make default in the payment of the interest on the said first mortgage bonds so substituted, or shall make default in the

payment of the bonds themselves when they shall become due: *Provided*, That the minimum price for which said railroad shall be sold shall not be less than three-fourths of the amount of the then outstanding State bonds and interest coupons thereon remaining unpaid or unexchanged, so issued by the State for the benefit of the main line of the Pacific Railroad, and the amount of the said first mortgage bonds and interest thereon then remaining outstanding and unpaid: *And provided further*, that if said railroad shall bring any amount over and above that which may be required to pay off the then outstanding State bonds and interest thereon, issued for the benefit of the said main line, and the said first mortgage bonds and interest thereon remaining unpaid, said amount shall be paid to the said Pacific Railroad Company. Six months' public notice shall be given of the time and place of sale of said railroad, in such manner as may be prescribed by the Governor of the State of Missouri. *And provided further*, That the obligation upon the Pacific Railroad Company to issue said first mortgage bonds, in all cases where State bonds and coupons, issued by the State for the benefit of the main line of said railroad, may be presented in pursuance of this section, shall be imperative.

SEC. 7. It shall be the duty of the Fund Commissioner to apply the net earnings of the road, after paying the expenses of his salary, first, as provided in section one; second, to the payment of interest as the same shall become due and payable on the first mortgage bonds issued and exchanged, as provided in section six, and next, not to exceed six per centum divided on the preferred stock, as provided in section eight, and the surplus, if any, to the purchase of the outstanding State bonds, with interest coupons thereon, at the best market rates. *Provided, however*, that in purchasing said bonds the price to be paid for them shall first be approved by the Governor. It shall be the duty of the Fund Commissioner, further, to examine, from time to time, the books, papers and accounts of the road; and if, at any time, it shall appear to him that the same are not properly kept, the gross receipts of said road, or any part thereof, are not promptly paid over to him, or that irregularities exist in the construction or conduct of the road, to call the attention of the Governor thereto, whose duty it shall be to examine into, and correct such irregularities, in such manner as in his judgment may be deemed right and proper.

SEC. 8. The holders of bonds of the State of Missouri, issued to the Pacific Railroad Company, are hereby authorized to invest said State bonds in the capital stock of said corporation, and the Pacific Railroad Company, upon the deposit of such bond or bonds with the treasurer of the State of Missouri and the cancelling of the same, are hereby authorized to enlarge the capital stock of said corporation to an extent equal to the amount of bonds so invested, and to issue to the holder or holders of said bond or bonds, certificates of full paid stock for the amount of the bond or bonds so deposited and canceled; said stock to be preferred in the payment of dividends which may accrue or be made payable from the earnings of the road, in preference to any stock now issued or may be issued, for any subscription to the capital stock, by virtue of any contract or other agreement made prior to the passage of this act; but no dividend on any such preferred stock shall exceed the rate of six per centum per annum, until the amount due by said Pacific Railroad Company to the State of Missouri, for all liabilities incurred, and for advances made, are fully paid. And nothing in this section shall be construed to release the State lien upon said road, as now provided for by law, only so far as the same may be made applicable to the issuing of the bonds herein specifically provided for in the first section of this act, as aforesaid.

SEC. 9. It shall be the duty of the Superintendent of the Pacific Railroad to provide that all the pay-rolls for all the monthly payment of the employees on the railroad are made out correctly, and furnished to the Fund Commissioner on the fifteenth day of each month, as also the proper vouchers for all articles or materials purchased, which may be necessary for the operation of the road. Monthly reports of the condition of the road, together with a full statement of the business of the same, shall be made by him to the Governor of the State, who shall cause the same to be filed in the office of the Secretary of State; and any outlay deemed necessary, beyond and outside of the actual operating expenses, by the directors of the road, shall be first approved by the Governor and chief engineer before the same shall be paid by the Fund Commissioner.

SEC. 10. All contracts for the work required for the extension of the Pacific Railroad to Kansas City shall be advertised for at least one month in such of the public papers

in Missouri, Chicago, Illinois, Cincinnati, Ohio, and the city of New York, as the directors may select; and all proposals shall be recorded in a proper book, kept for that purpuse, in the railroad company's office. At the time of allotting the work, the lowest responsible bidder shall be entitled to the contract, which shall not exceed ten miles in length; fifteen per centum of the amount agreed to be paid upon any such contracts shall be retained until the contract is fully completed; and if it shall appear that said contract has not been fully and faithfully performed, or that the party or parties to said contract have been, directly or indirectly, through themselves or others, interested in any other contract, while the first is incomplete, then the per centum thus retained, and any other balance remaining unpaid, shall be considered as forfeited to said railroad company as liquidated damages.

SEC. 11. Within sixty days from the passage of this act the stockholders of the Pacific Railroad Company, and of the North Missouri Railroad Company, are hereby authorized and empowered to assemble for the purpose of accepting or rejecting the provisions thereof, by a vote of a majority in interest thereof; and the acceptance of this act shall be filed in the office of the Secretary of State, and the same shall be binding upon said companies respectively; and for the purpose of carrying out the intent of this section, it is made the duty of the presidents of the several railroad companies provided for in this act, within fifteen days after its passage, to call together the stockholders of their respective companies, giving not less than ten days' notice of the time and place of such meetings, in such newspapers as may be selected by them for such purpose.

SEC. 12. The Chariton and Randolph Railroad Company and the Missouri Valley Railroad Company may, by a vote of a majority of their stockholders in interest, transfer and assign to the North Missouri Railroad Company all of their effects and assets, rights and privileges under their respective charters, and all the work that has been done in the construction of the said roads; and upon such transfer being accepted by the North Missouri Railroad Company, the said Chariton and Randolph Railroad Company and the Missouri Valley Railroad Company shall cease to have a corporate existence, and shall be styled and known as the West Branch of the North Missouri Railroad; said West Branch

to commence at the town of Moberly, in the county of Randolph, on the North Missouri Railroad, and extend west along the route adopted by the Chariton and Randolph Railroad Company, to the city of Brunswick; and thence on or near the present survey of the Missouri Valley Road to Richmond, in Ray county; and from thence by the most advantageous and practible route to some point on the north side of the Missouri river, at or below St. Joseph. And all the franchises vested in the said Chariton and Randolph Railroad Company and the Missouri Valley Railroad Company shall become, by such transfer and acceptance as aforesaid, fully and completely vested in the North Missouri Railroad Company. *Provided, however*, That if the transfer and acceptance aforesaid is not made by and between the said Chariton and Randolph Railroad Company, the Missouri Valley Railroad Company, and the North Missouri Railroad Company, and a connection thereby formed, as is contemplated may be done by this act, then, and in that event, the Missouri Valley Railroad Company shall have full power to issue the same amount in bonds herein provided to be issued by the North Missouri Railroad Company for the benefit of the said West Branch of the North Missouri Railroad as aforesaid; said bonds, when issued by the Missouri Valley Railroad Company, to be issued in like manner, with like effect, and with the same lien on the Missouri Valley Road, in all respects, and to all intents and purposes, as if the same had been issued by the North Missouri Railroad Company for the benefit of said West Branch. *And provided further*, No connection formed by and between the Chariton and Randolph Railroad Company, the Missouri Valley Railroad Company and the North Missouri Railroad Company, shall operate or have the effect to create any lien upon the said West Branch aforesaid for any liabilities of said North Missouri Railroad, or for any State bonds issued for the benefit of said road prior to the transfer, acceptance, and connection provided for as herein aforesaid shall have been made. *And provided further*, That the said West Branch shall not be liable for any of the indebtedness or liabilities of the main line of said North Missouri Railroad; that the accounts and business of the said North Missouri main line and the said West Branch shall be kept separate and distinct from each other, so that one road shall not become or be held liable for the liabilities and indebtedness of the other.

SEC. 13. For the purpose of enabling the North Missouri Railroad Company to complete the main road to the Iowa State line, and also for the purpose of enabling them to construct the West Branch aforesaid, and for the purpose of building a bridge across the Missouri river at or near the town of St. Charles, on which the said company can cross its trains, said company is hereby authorized to borrow money to the amount of two millions of dollars, and to this end may issue two thousand bonds, of one thousand dollars each, bearing interest at the rate of not more than seven per centum per annum, with coupons attached, payable semi-annually, the principle having four, five, six, seven, eight, nine, and ten years to run in equal amounts; said bonds to be secured by a first mortgage on the main line of the road north of Macon City, and on the West Branch aforesaid. That the lien on said West Branch shall only extend to that part and portion of the road constructed with the proceeds of the bonds issued for the same, and on the stock of the North Missouri Railroad Company in said Bridge Company on the bridge aforesaid: and the proceeds of the bonds to be applied to the completion of the main trunk from its present terminus to the Iowa State line, and to the extension of the West Branch aforesaid, and to the building of the bridge aforesaid, the application thereof to be in the following proportions, to wit: the proceeds of one thousand of said bonds to the completion thereof to the Iowa State line, and the proceeds of seven hundred thereof to the extension of the West Branch aforesaid, and the proceeds of three hundred thereof to the building of said bridge. And all the provisions of this act in reference to the Pacific Railroad aforesaid, in sections one, two, three, four, six, seven, eight and nine thereof, are to be applied to the North Missouri Railroad, the West Branch thereof, and the said bridge and the company, as fully and effectually as the same are applicable to the said Pacific Railroad; and all the conditions and stipulations, liabilities and requirements of said sections, are hereby imposed upon said North Missouri Railroad and the West Branch thereof, as fully and obligatory as if the same were in this section recited. The intent and purpose of this provision being that the Pacific Railroad and its Company, and the North Missouri Railroad and the West Branch thereof and their Company, shall be placed under equal conditions, restric-

tions and liabilities, and be sharers of the benefits granted in this act equally, according to the provisions thereof.

SEC. 14. The North Missouri and Iron Mountain Railroads are hereby authorized to connect their line of road with the main line of the Pacific Railroad, in the county of St. Louis, if the Board of Directions of said roads agree, and find it to the interest of said roads, and for that purpose are authorized to condemn the right of way over any lands whatsoever, in conformity with the rights granted to them in their respective charters.

SEC. 15. The Pacific Railroad Company shall immediately apply all the net earnings of the Southwest Branch, since the first day of July, 1861, and all the net earnings that may accrue, to the further construction of said Southwest Branch from Rolla to its western terminus, and shall, as speedily as possible, sell such lands as the said Southwest Branch may be entitled to out of the lands donated to the State of Missouri by the Congress of the United States, and shall also apply the proceeds of all such sales to the construction of said road from Rolla to its western terminus. The said Pacific Railroad Company shall complete the said Southwest Branch from Rolla to the mouth of Little Piney within fourteen months from the passage of this act.

SEC. 16. There is hereby reserved to each and every person who originally made, or who was the owner by purchase or otherwise, on the third day of March, 1855, of any improvement for agricultural purposes upon any railroad land along the line of the Southwest Branch Railroad, the right of pre-emption to one hundred and sixty acres of land, including the improvements made thereon, according to the several acts of the General Assembly in such cases made and provided; but this right of pre-emption shall not be construed to apply to any land of the company where there has been lead or ore dug, or known as mineral land, it being the intention to secure the right of purchase solely to agricultural lands; and every person who has or may hereafter establish his right of pre-emption according to this or any former act, shall pay at the rate of two dollars and fifty cents per acre for the land pre-empted.

SEC. 17. It shall be the duty of said Pacific Railroad Company, as fast as said Southwest Branch Railroad is completed, to cause a notice thereof to be given by advertisement in two St. Louis weekly newspapers and such newspapers as

shall be published along the line of the said Southwest Branch Railroad, and require the persons along the said completed line of road, and for twenty miles beyond, whose right to purchase the lands of said company is reserved by this act, to come forward and pay for the same; and all persons having such right of purchase, who shall fail to pay the purchase money for their lands within six months from the first publication of said notice, shall be held to have abandoned their right of purchase, and the same shall thenceforth become void.

SEC. 18. All acts and parts of acts inconsistent with this act are hereby repealed; and this act shall take effect and be in force from and after its passage.

Approved February 10, 1864.

AN ACT authorizing the county of St. Louis to issue bonds.

Be it enacted by the General Assembly of the State of Missouri, as follows:

§ 1. The county court of St. Louis county is hereby authorized to issue seven hundred county bonds of the denomination of one thousand dollars each, having twenty years to run, and bearing interest at the rate of seven per cent. per annum, payable semi-annually, the principal and interest payable in the city of New York, and loan said bonds to the Pacific Railroad Company for the completion of said road; said bonds to be issued under such conditions as may be agreed upon between said county court and the board of directors of the Pacific Railroad Company, such conditions to be binding on the parties, but shall not impair or affect the validity of the bonds after they are issued.

§ 2. The Fund Commissioner of the Pacific Railroad, or such person as may at any time hereafter have the custody of the funds of said railroad company, shall, every month after said bonds are issued, pay into the county treasury of St. Louis county, out of the earnings of said Pacific Railroad, four thousand dollars, and one thousand dollars additional in each month of December, to meet the interest on the said seven hundred bonds; said payments to continue until said bonds are paid off by the Pacific Railroad.

This act to take effect and be in force from and after its passage.

Approved January 7, 1865.

AN ACT for the sale of the Pacific Railroad, and to foreclose the State's lien thereon, and to amend the charter thereof.

SECTION

1. Governor empowered to sell the Pacific Railroad; under what provisions.
2. Road not to be sold under eight millions of dollars; how to be conducted.
3. Gauge of road to be changed.
4. Governor to execute deed for road; when.
5. Present company may get a deed of release; under what conditions, and within what time.
6. State to assume St. Louis county loan and floating debt; when.
7. Duties of Governor in case of purchase by the State.
8. Board of Directors to be elected; their organization and duties; auditor's and treasurer's duties in regard to Dresden mortgage and St. Louis county bonds.
9. Governor to make publication for bids.
10. Conditions of bids for purchase.
11. Pacific Railroad subject to general railroad law.
12. Office of Fund Commissioner abolished in case of sale.
13. Purchasers to assume term of contract with the Boonville extension of Osage Valley and Southern Kansas Railroad Company.
14. South Pacific Railroad Company to have right to run trains between Franklin and St. Louis.
15. When to take effect.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. The Governor is hereby directed and required to sell the Pacific Railroad and its appurtenances, and all property belonging thereto, in accordance with the provisions of section 5 of this act and an act entitled "An act to expedite the construction of the Pacific Railroad and of the Hannibal and Joseph Railroad," approved February 22, 1851.

SEC. 2. Upon a sale of the road, as provided in the foregoing section, the price and sum for which the same shall be sold shall not be less than eight millions and three hundred and fifty thousand dollars, payable to the State treasurer, in bonds of this State or in money, within ninety days from the day of sale. No bid, except the bid of the Governor on behalf of the State, shall be accepted unless there is paid to the State treasurer, who shall attend said sale, an amount of not less than three hundred thousand dollars, in such bonds or money, as a part of the purchase money to be paid when the road is stricken off; and such bonds or money shall be forfeited to the State in case the purchaser

or purchasers shall fail to pay the amount of purchase money bid within the time above provided for. Such sale shall take place at the east front door of the court house, in the city of St. Louis, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon. If said sum of eight millions three hundred and fifty thousand dollars is not realized at such sale, the Governor of the State shall, by himself or agent, buy in the same for, and in the name of, the State of Missouri.

SEC. 3. The purchaser or purchasers of said road, under this act, shall bind himself or themselves to the State, and it is hereby made a condition of said sale, to change the gauge of said Pacific Railroad so as to conform to the gauge of the Union Pacific railroad, eastern division, within ten years from the date of sale.

SEC. 4. Upon the payment of all the purchase money, as specified in section 2 of this act, and upon the delivery of an obligation in conformity with section 3 of this act, the Governor shall execute a deed to the purchaser or purchasers, conveying all such right, title, and interest in and to said Pacific Railroad, its franchises, appurtenances, and the property belonging thereto, as are subject to the lien of this State.

SEC. 5. If the Pacific Railroad Company shall, at any time within ninety days after the first day of April, 1868, pay into the treasury of the State the sum of three hundred and fifty thousand dollars, in the bonds of this State, or in money, then, in that event, the Governor shall not advertise said road for sale; and if the said company shall, within ninety days thereafter, pay into the State Treasury an additional sum equal to five millions of dollars in all, (the same being either in cash or Missouri State bonds,) the Governor shall, upon the production of the receipts of the State treasurer for said amounts, execute and deliver to the said Pacific Railroad Company a deed of release for all claims, title, and interest which the State of Missouri has in and to the said Pacific Railroad, its property and appurtenances; and the said Pacific Railroad Company shall, from and after the delivery of said deed, be fully discharged from all claims or debts due to the State, and all liability growing out of the issue of the bonds of the State to aid in the construction of said road, and no sale shall, in that event, take place under this act. If, however, from any cause the said company

shall be unable to pay the additional sum as herein provided, the Governor shall proceed to advertise said road; but if the said company shall, during the pendency of said advertisement, pay into the State treasury the said additional sum, with interest thereon from the 1st day of October, 1868, at the rate of 6 per cent. per annum, then, and in that case, no sale of said road shall take place, and the Governor shall execute and deliver to the said Pacific Railroad Company the deed of conveyance and release provided for in this act, and the said Pacific Railroad Company shall be exempt from all the liabilities and obligations herein specified; but in case the said company shall, after the payment of three hundred and fifty thousand dollars above stated, fail to pay the additional sum specified, (being the remainder of the five millions,) then, and in that case, the sum first paid shall be forfeited to the State.

SEC. 6. In case of a sale of said road under the provisions of sections 1, 2, 3, and 4 of this act, the State of Missouri shall assume the payment of principal and interest due on seven hundred thousand dollars in bonds issued by the county of St. Louis as a loan to the Pacific Railroad Company, under the act of January 7, 1865, and also the floating debt of said company existing at the time of the passaage of this act, not to exceed the amount of six hundred and fifty thousand dollars.

SEC. 7. In case of a purchase by the Governor, in behalf of the State, as provided in section 2 of this act, he shall take possession of the said road, together with all property and appurtenances belonging thereto, and shall then turn the same over to the Board of Directors hereinafter provided for.

SEC. 8. There shall be elected, immediately after the passage and approval of this act, in joint session of the General Assembly, nine directors, one from each congressional district. Said directors shall, as soon as the Governor shall have taken possession of the road, choose one of their own number for president and one for treasurer, who shall each give bond in the sum of one hundred thousand dollars for the faithful performance of his duties, which bond shall be approved by the Governor and filed in the office of the secretary of state; and said president and Board of Directors shall thereupon have authority to operate said road, in the same manner and with like powers as the president and

directors of said Pacific Railroad Company are now by law authorized, until said road is otherwise disposed of, as hereinafter provided, and for that purpose may make all needful regulations. They shall make monthly reports, under the the oaths of at least three of their number, to the Governor, of all transactions connected with the operations of said road, and shall account for and pay over to the State treasurer all moneys that may come into their hands belonging to the State and derived from the net earnings of said road, taking duplicate receipts therefor, one of which shall be deposited in the office of the State auditor. The said auditor shall also draw his warrant on the State treasurer, upon the presentation of the proper coupons, of any interest then maturing on the Dresden mortgage bonds and St. Louis county bonds, above mentioned, for the amount of said coupons, which warrants shall be paid by the treasurer.

SEC. 9. Within thirty days after the road and the property belonging thereto shall have passed into the possession of the State, the Governor shall publish a notice in such paper as he may deem proper, inviting proposals or bids for the purchase or lease of the Pacific Railroad; and he shall receive such bids and proposals until ten days prior to the meeting of the twenty-fifth General Assembly, and within ten days after the meeting of such General Assembly he shall transmit the same, with a special message, to the said General Assembly for its action.

SEC. 10. All bids and proposals for the purchase of said road shall assume, first, the payment of principal and interest, due and to become due, on the one million five hundred thousand dollars, first mortgage bonds, issued under the act of February 10, 1864; second, the principal and interest due on the seven hundred thousand dollars bonds, issued by the county of St. Louis to the Pacific Railroad Company, under the act of January 7, 1865; third, the floating debt of said Pacific Railroad Company, existing at the time of the passage of this act, not to exceed the amount of six hundred and fifty thousand dollars; and all bids and proposals for leasing said road shall assume the payment of the floating debt of the said Pacific Railroad Company, existing at the time of the passage of this act, not to exceed the amount of six hundred and fifty thousand dollars. And all bids, whether for a purchase or lease of said road, shall be based upon a stipulation, on the part of the purchaser or lessee, to

change the gauge of said road to conform with the gauge of the Union Pacific Railroad, eastern division, within the period of two years from the date of sale or lease.

SEC. 11. The said railroad company shall be subject to the provisions of the general laws of the State now in force or hereafter to be enacted, classifying freights and fixing the regulations, rates and charges for the transportation of freights and passengers by the railroads in this State; provided, that the provisions of this section subjecting the Pacific Railroad to future legislation shall not take effect for ten years after the passage of this act.

SEC. 12. In case of sale, as prescribed in sections 2 and 5, the office of Fund Commissioner is hereby abolished, and all provisions of an act entitled "an act for the extension and completion of the Pacific Railroad to the western boundary of the State, at Kansas City, and the North Missouri Railroad to the Iowa line, to complete the Southwest branch of the Pacific Railroad, and to reduce the State indebtedness," approved February 10, 1864, applying to a Fund Commissioner, and prescribing his duties and powers, are hereby repealed.

SEC. 13. In the event of the sale of the Pacific Rail road, as provided in sections 1, 2, 3 and 4 of this act, the purchaser or purchasers thereof shall take the same, subject to the terms and conditions of a certain lease and contract made and entered into by and between the Pacific Railroad Company and the Boonville extension of the Osage Valley and the Southern Kansas Railroad Company, bearing date the 10th day of February, 1868, under which said lease and contract the Boonville extension of the Osage Valley and Southern Kansas Railroad Company have leased their road to the Pacific Railroad Company for the term of thirty years from the 15th of September, 1868; and the provisions of such lease and contract shall be and are hereby declared to be binding upon the purchaser or purchasers as aforesaid.

SEC. 14. The South Pacific Railroad Company, when organized, shall have the right to run their trains over the track of the Pacific Railroad, from Franklin to St. Louis and return, until the said South Pacific Railroad Company shall construct their road from Franklin to St. Louis, on such terms and for such compensation as the said companies shall agree upon, or, failing to agree, each of said companies

shall choose a competent railroad superintendent, who shall select a third, a majority of whom shall fix said terms; provided, such right and agreement shall not continue more than ten years after the passage of this act.

SEC. 15. This act to take effect from and after its passage.

Approved March 31, 1868.

IN THE

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1876.

WILLIAM T. AYRES, EX'R, &C., APPELLANT,

vs.

THE CITY OF CHICAGO, ET AL., APPELLEES.

And now comes the City of Chicago, one of the appellees in the above entitled cause, by Elliott Anthony, its Attorney, and moves the Court to dismiss the said appeal for the following reasons, to wit:

1. The order from which the appeal was prayed in this cause, is an order remanding the cause from the Court below, to wit: from the Circuit Court of the United States to the Superior Court of Cook County, and is not an order from which an appeal is allowed by the statutes of the United States, or the practice of this Court.

2. Because the order appealed from is not an order on the merits of the cause, and is not a final order, judgment or decree from which an appeal lies.

A copy of the opinion of the Court below, on the motion to remand the cause to the State Court, which contains a "brief statement of the facts," published at length in 8 *Legal News*, p. 49, is hereto annexed, and made a part of this motion:

UNITED STATES CIRCUIT COURT,
NORTHERN DISTRICT OF ILLINOIS.

CITY OF CHICAGO, *v.* DAVID A. GAGE, *et al.*
In Chancery.

REMOVAL OF CAUSE FROM STATE TO FEDERAL COURT—
ACT OF 1875 CONSTRUED.

1. PARTIES TO THE CONTROVERSY.—The Court states who are to be regarded as parties to the controversy, within the meaning of the act, so as to entitle the case to be removed from the State to the Federal Court.

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2. WHOLE CASE MUST BE REMOVED.—That a complicated chancery suit may almost necessarily involve, in some of its collateral issues, the rights and interests of citizens of different States, but unless the original controversy which the suit is brought to determine be between citizens of different States, or between such parties as give the Federal Courts jurisdiction, it would not seem that Congress intended to provide for the removal thereof, inasmuch as the whole case must be removed instead of that collateral branch or part involving a controversy between citizens of different States.

3. THIS CASE.—That this is not such a case as was intended to be removed from the State to the Federal Court.—[ED. LEGAL NEWS].

BLODGETT, J.

This case was originally commenced in the Superior Court of Cook County, and removed to this Court on the application of the defendant, Ayers. A motion is now made on behalf of the complainant to remand the case to the Superior Court, because of facts appearing upon the face of the record.

The record shows that, on the 27th day of December, 1873, David A. Gage, and his wife, of the City of Chicago, executed and delivered to George Taylor, also of said city, a deed conveying to said Taylor, in trust, certain property for the purpose of securing the City against loss of any indebtedness which might exist from Gage to the City, as late treasurer thereof, and for other purposes therein expressed. Said deed did not state what the amount of said indebtedness was, but declared that said conveyance was not to be, in any sense, a satisfaction of any part of said indebtedness. It included and conveyed to Taylor a large amount of real property situated in Chicago and its suburbs, some portions of which were improved and yielding income. It empowered the trustee, during the period of eight months from the date of the deed, to enter immediately into the possession of said property, control and manage the same, receive and collect the rents, income and profits thereof, and out of the same pay the taxes, assessments and insurance; to sell and convey, under the direction and with the concurrence of the Comptroller of the City, all or any part of said property, and out of the net proceeds of the said sales, rents, income and profits, to pay over to the City, from time to time, to apply on the indebtedness of Gage to the City, such sums as might be available for that purpose. At the expiration of eight months the comptroller was authorized to require the peremptory sale of so much of said property as should then remain unsold, for cash, and the said Taylor, as trustee, was required to comply with said request and apply the net proceeds of the sales so made to the satisfaction of the unpaid remainder of said indebtedness.

Taylor accepted the trust, entered upon the possession, control and management of the property, and made some sales thereof, and partial payments to the City within the eight months allowed for that purpose.

After the expiration of said eight months, a large portion of the indebtedness, claimed by the City, against Gage, as its late treasurer, still remaining unpaid, the comptroller ordered the trustee to sell the rest of the property on hand for cash. Said trustee refused to comply with the order of the comptroller, alleging as the ground of said refusal, that said deed did not state the amount of said

indebtedness; that he did not know the amount of it, himself, and that he was unwilling to sell and pay over the proceeds of such sale to the City, until a competent court had first found and decreed the balance due from Gage to the City. Thereupon the City filed the bill in this case, in the Superior Court of Cook County, setting out the said trust deed, and alleging that, at the time of the making thereof Gage was indebted to the City, as treasurer, for a balance of five hundred and seven thousand, seven hundred and three dollars and fifty-eight cents, for the security of which it was claimed that Taylor held the property, so conveyed to him by said trust deed; and prayed that the Court would take an account and ascertain the amount due, and give a decree in favor of the City for the same, and order the said trustee to proceed and sell the trust property remaining unsold, and apply the proceeds of such sale to the satisfaction of the amount so found due. Gage and wife and Taylor, were the only defendants to this bill.

Gage answered the bill, denying that he owed the City anything. Taylor also answered, stating his belief that the amount due by Gage to the City was that stated in the bill, but alleging that he did not know what was the real amount of said indebtedness, and prayed that the court would find and decree the amount of said indebtedness, and order the sale, and declare the amount to be paid by him out of the proceeds.

In February last, William T. Ayres, a citizen of Alabama, acting as executor for Charles P. Gage, deceased, late of said State of Alabama, recovered a judgment in this court against said David A. Gage for three thousand and six dollars and ninety-two cents. Execution was issued on said judgment, and returned "no property."

Thereupon Ayres applied to the Superior Court to be made a party defendant to the bill in this case, which application having been granted, he answered the bill, and also, by leave of court, filed a cross-bill, in both of which he alleged in substance the recovery in this court of said judgment against Gage, the issue of his execution and return, and charged that said judgment was an equitable and prior lien upon the property so held in trust by said Taylor; alleging that no indebtedness, in fact, existed from Gage to the City; that by the action of the Common Council of the City, Gage had been permitted to loan the funds of the City, and to pay certain interest arising therefrom to the City; that by reason of certain advances which had been made from certain of the general funds to certain specific funds by Gage while acting as City Treasurer, certain equitable considerations had arisen which ought to defeat, and did defeat any claim at law, or in equity, in favor of the City against Gage, praying it might be found and decreed that no indebtedness existed from Gage to the City, and that the property conveyed by Gage to Taylor, the Trustee, was legally and equitably subjected to the lien of his judgment, as against the City, and asking the Court to decree a satisfaction thereof out of the same.

After having filed his said answer and cross-bill, Ayres filed his petition in the Superior Court, setting up that he was a citizen of the State of Alabama; that there was a controversy in said suit between himself and said Gage, who were citizens of the State of Illinois, and of this district, and asking that said cause be removed from said Superior Court to this Court for trial.

The Superior Court entertained said petition, and ordered the removal of said cause to this Court; and the question is: Does there enough appear on the face of the record to justify this Court in holding jurisdiction of the case?

The fifth section of the act of March 3d, 1875 (Eighteenth Statutes at Large, 472) provides: "That if, in any suit commenced in a State Court, or removed from the State Court to the Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants for the purpose of creating a case, cognizable or removable under this act, the said Circuit Court shall proceed no farther therein, but shall dismiss the suit, or remand it to the court from which it was removed, as justice may require."

The first question which suggests itself to my mind in discussing this motion, is—between whom is the controversy in this case?

The original suit was brought by the City of Chicago, to determine the amount of indebtedness due to it from Gage, and to require the payment of that indebtedness out of the property held in trust by Taylor for that purpose. In his answer, in that case, Gage denied any indebtedness between himself and the City. I think it unnecessary for the purposes of this inquiry to investigate the grounds upon which Gage based that denial; it is sufficient, for this motion, to say that by the bill, answer and replication in the case, as it stood at the time Ayres made himself a voluntary party thereto, the controversy in the case was between the City and Gage, as to whether there was, in fact, an indebtedness, and the amount thereof, if any, from Gage to the City. The defendant, Ayres, does not raise any new controversy by his answer aad cross-bill, but simply makes himself a party to that which already existed, alleging, perhaps, more in detail, the grounds for denying any indebtedness from Gage to the City, but at the same time not changing in any degree the issue in the case, or the character of the controversy. The main question still is, as the pleadings now stand, and as they stood before Ayres came into the case: Does Gage owe the City anything which ought to be satisfied out of the proceeds of the property held in trust by Taylor, under the trust deed described in the complainant's bill? This being so, the controversy inaugurated in the suit is simply one between citizens of this State. True, Ayres, as a creditor of Gage, may be interested in the re-

sult of that controversy, because, if it terminates in favor of Gage, it leaves the property now held by Taylor subject, equitably if not legally, to Ayres' debt, but that does not in any degree, in my estimation, involve a controversy between the City and Ayres, in the original suit.

As was intimated by the learned Circuit Judge of this circuit in the case of Osgood against the Chicago, Danville and Vincennes Railroad Company, (7 Chicago Legal News, 241,) the statute of March 3d, 1875, clearly contemplates the removal of the *whole suit* from the State to the Federal Court, and not of such fragment or part thereof as may involve a controversy or question between two or more of the defendants. And we must look into the nature of the original controversy, which was the subject matter of the suit, to settle this question of right of removal.

A complicated chancery suit may, almost necessarily, involve in some of its collateral issues the rights and interests of citizens of different States; but, unless the original controversy which the suit is brought to determine be between citizens of different States, or between such parties as give the Federal Courts jurisdiction, it would hardly seem that Congress intended to provide for the removal thereof, inasmuch as the whole case must be removed instead of that collateral branch or part involving a controversy between citizens of different States.

Applying these suggestions to the case under consideration, it would seem that the controversy, as presented by the issues and pleadings is, as to whether or not Gage owes the City anything which should be paid out of this trust fund. That being determined, if determined against the City, the defendant Ayres may have a standing in Court to claim his pay out of the trust property, but not until then. Notwithstanding Ayres' interpolation into the suit, the real questions still stand at issue between the City and Gage, and Ayres only has rights as he may be subrogated to those of Gage. It is nowhere intimated in this case that there is any collusion between Gage and the City, or that the City suit is not prosecuted in entire good faith. If it had been made to appear that Gage had given the trust deed to Taylor for the purpose of defrauding Ayres, or that the conveyance was not *bona fide*, the parties to the controversy might be changed, and Ayres, or any creditor of Gage, might be the real party to the controversy with the City and trustee; but there is nothing of the kind in this case. It therefore seems clear to me that, upon the facts shown in the record, this suit is not such an one as was intended to be removed from the State to the Federal Court.

T. L. DICKEY, Corporation Counsel, and CHARLES H. MORSE, for City,
M. W. FULLER, for Wm. T. Ayres, of Alabama.

CITY LAW DEPARTMENT,
Chicago, Dec. 20, 1876.

MESSRS. FULLER & SMITH,

Attorneys for Appellant:

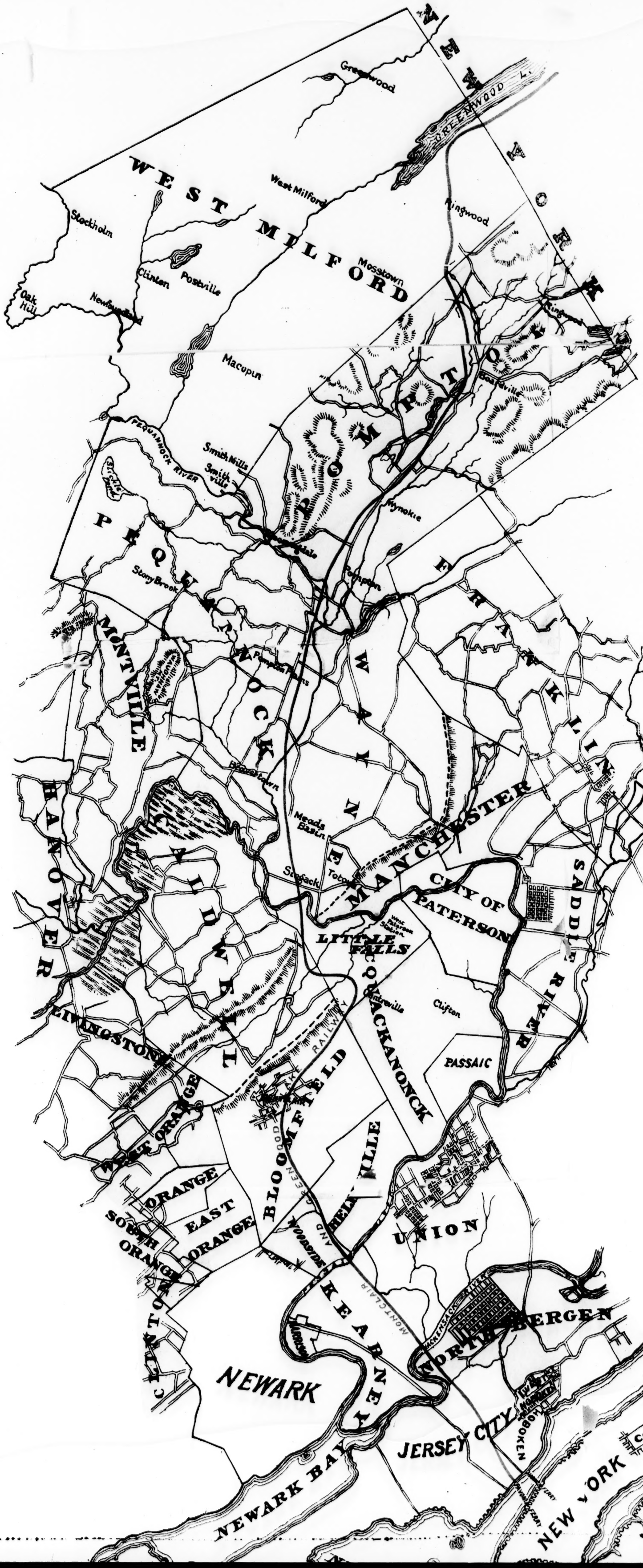
Please take notice that on Monday, January 15th, 1877, at the opening of the

Court, or as soon thereafter as counsel can be heard, I shall call up for argument and disposal, before the Hon. Supreme Court of the United States, at Washington, D. C., a motion to dismiss the appeal in the above entitled cause, a copy of which motion is above written, at which time and place you can appear, if you see fit.

ELLIOTT ANTHONY,
Attorney for Appellee.

We hereby acknowledge service of the above notice, with a copy of the motion, and of the opinion thereto attached, this 21st day of December, 1876.

MELVILLE W. FULLER,
Attorney for Appellant.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Clifton
Passaic
Union
Kearney
Harrison
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Holland Tunnel
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Woodside
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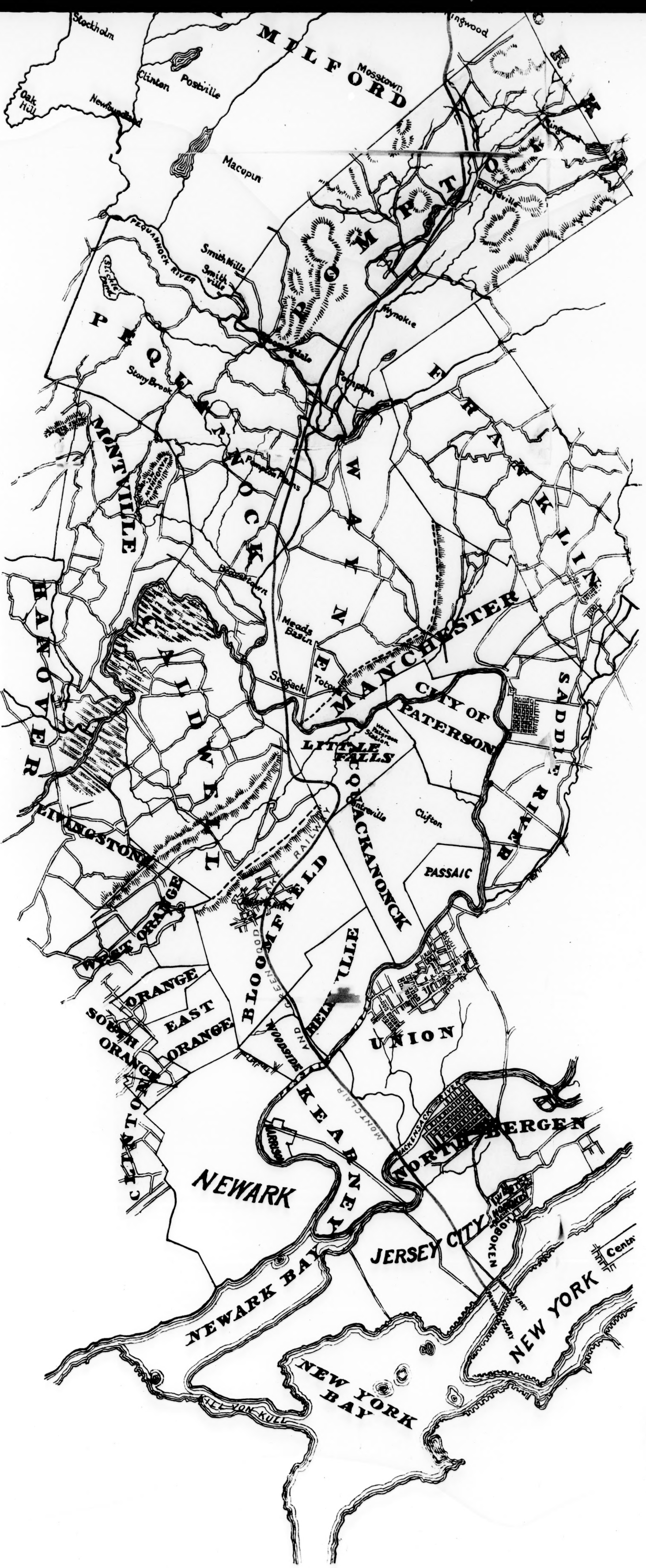
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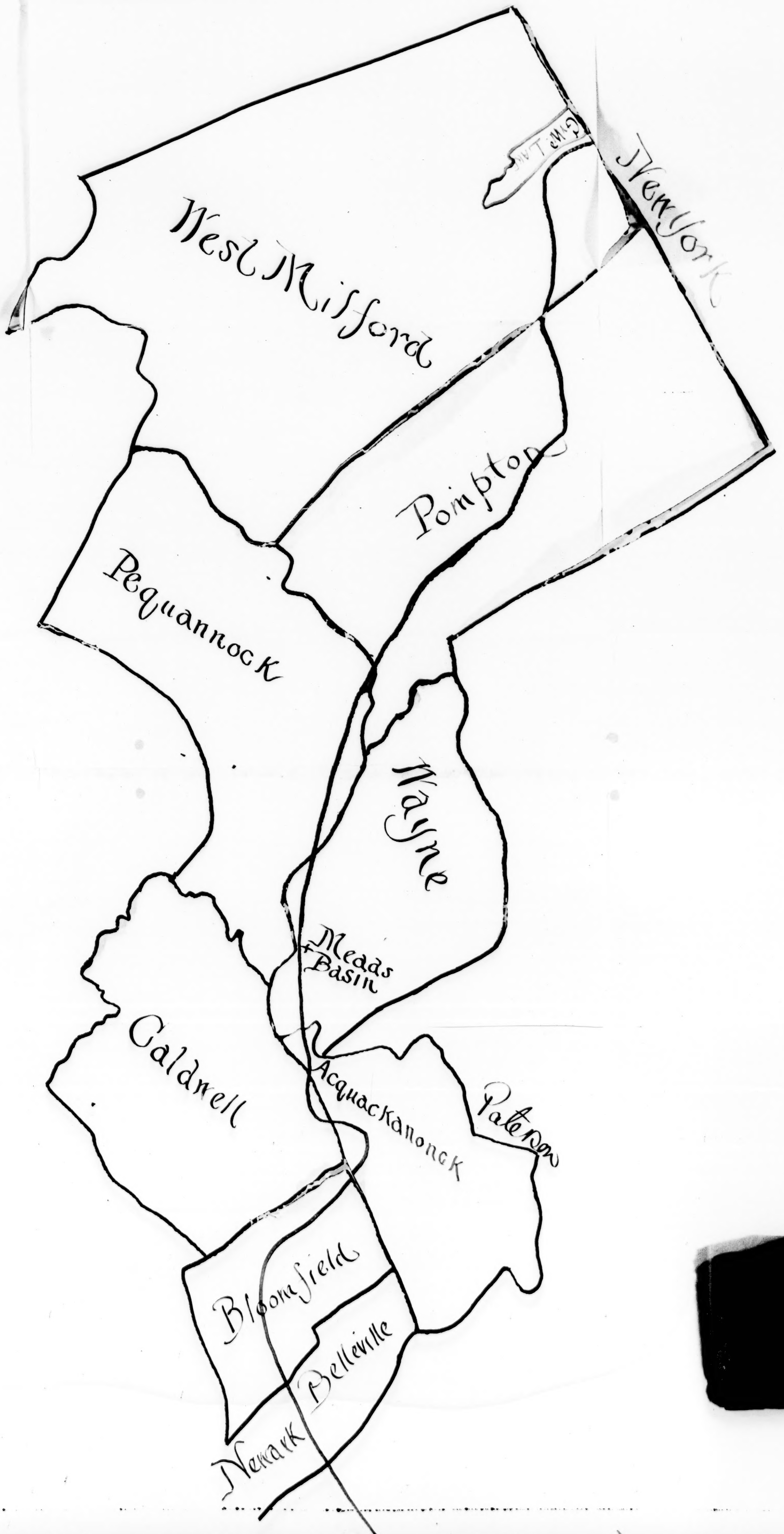
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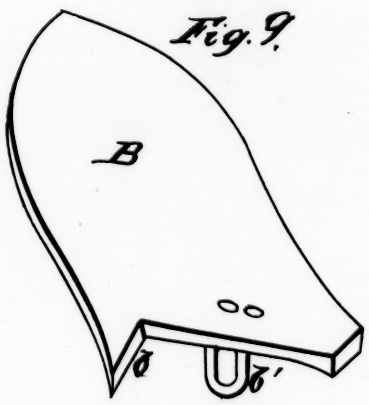
Fig. 9.



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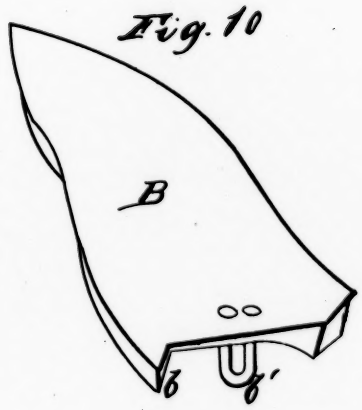

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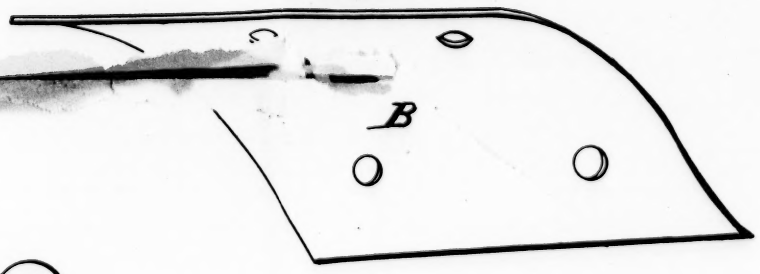

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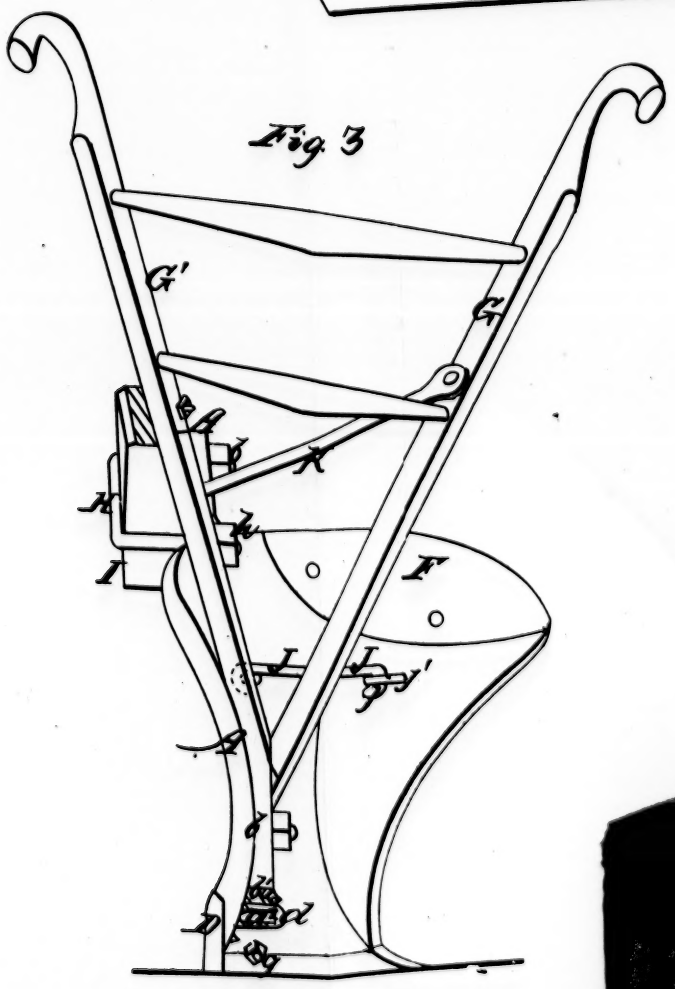

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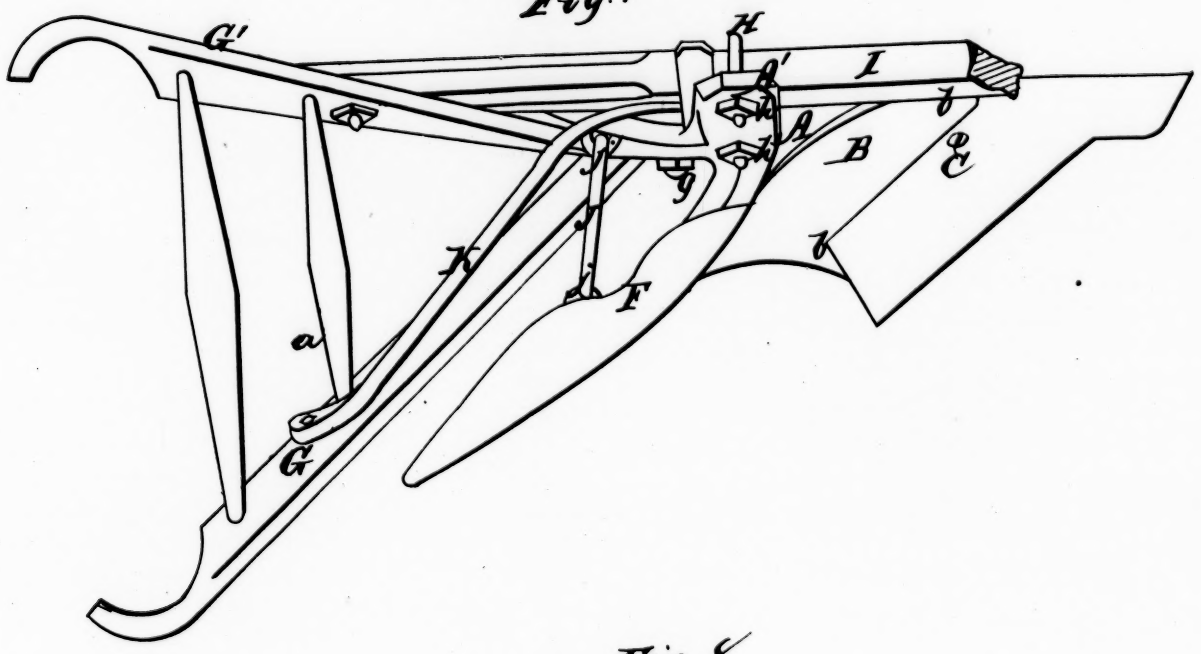
Fig. 1



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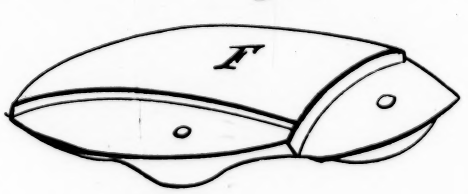

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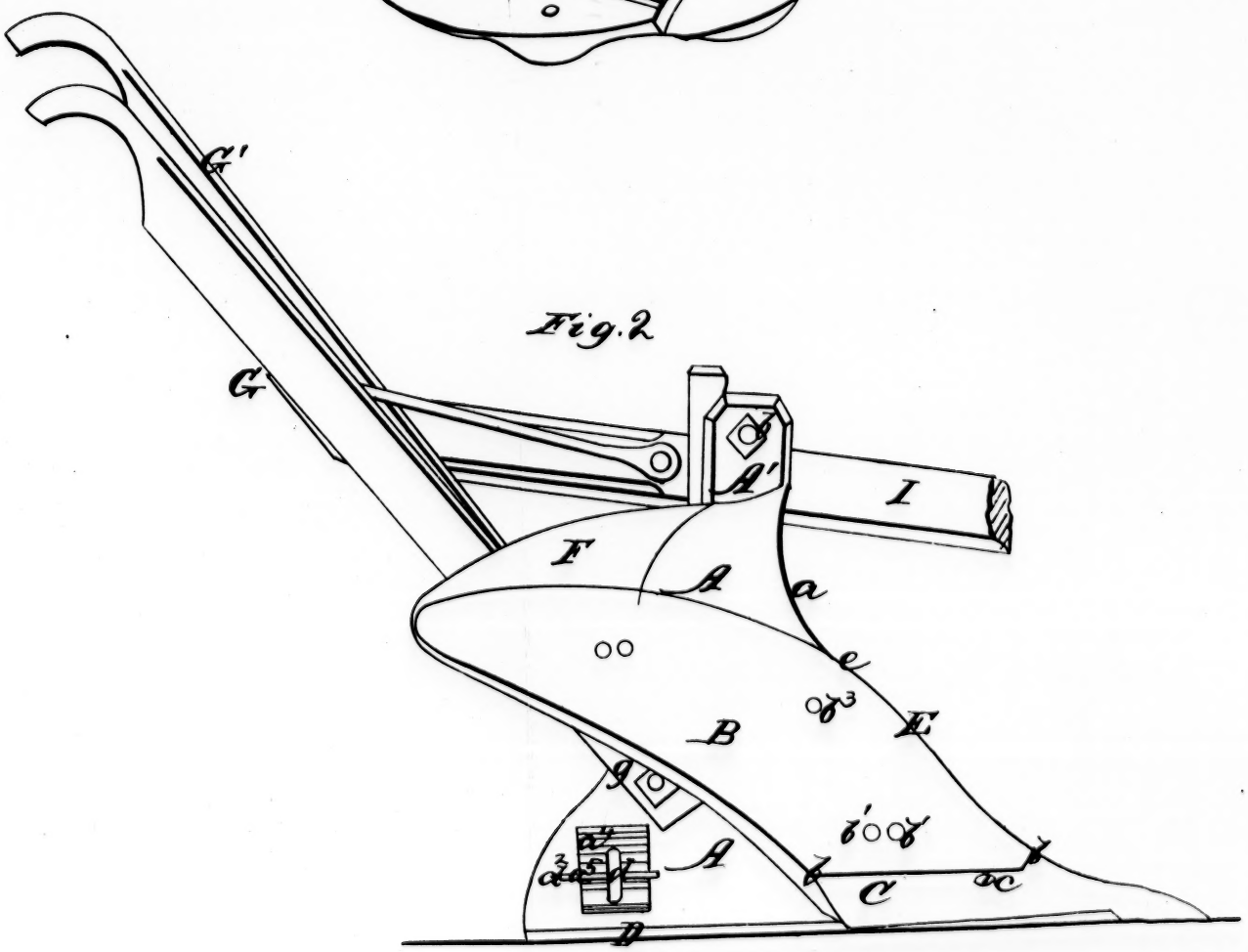

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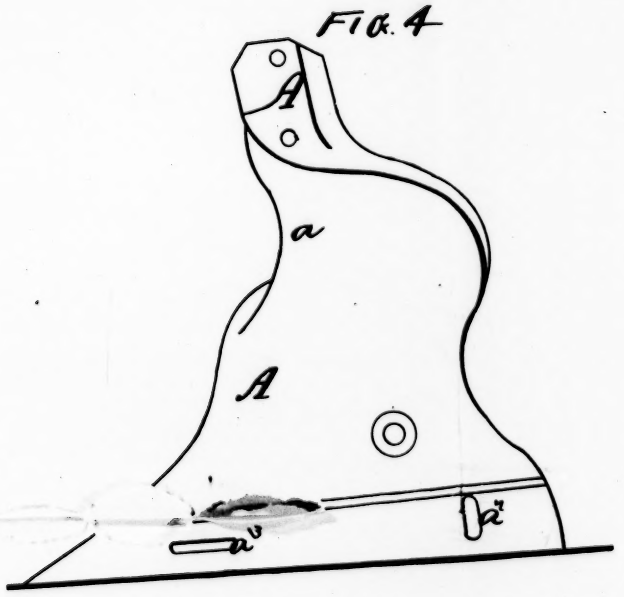
Fig. 4



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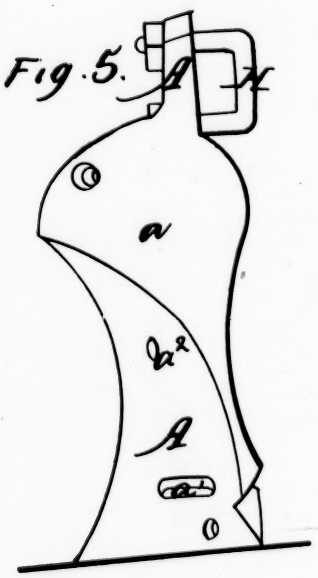

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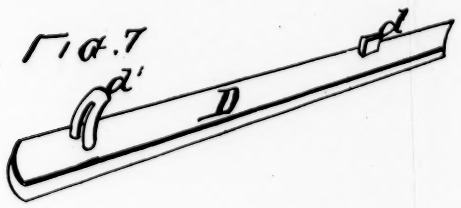

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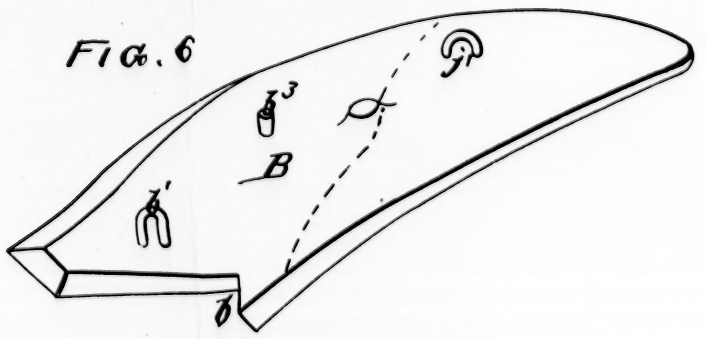

P.H. Starke's Plough.

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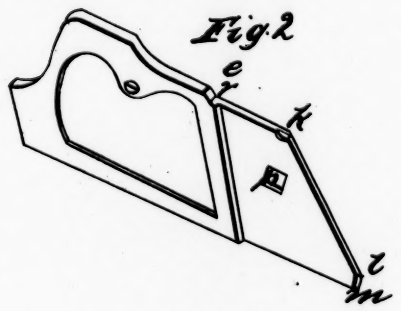
Fig. 2



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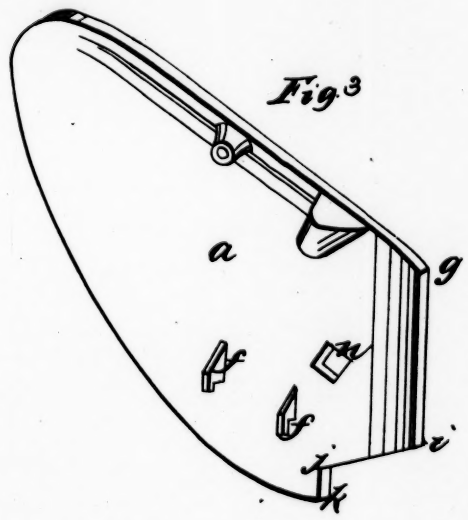

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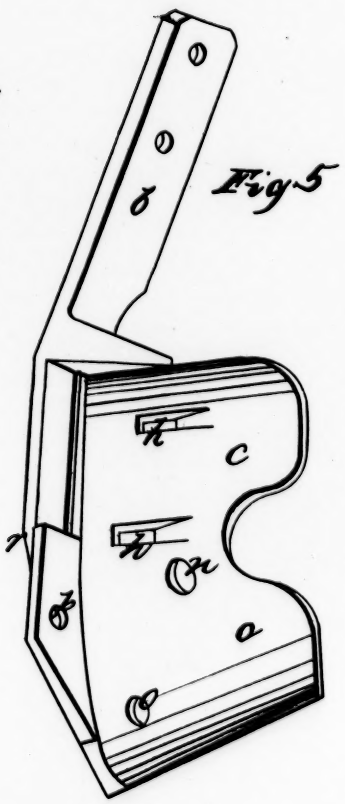

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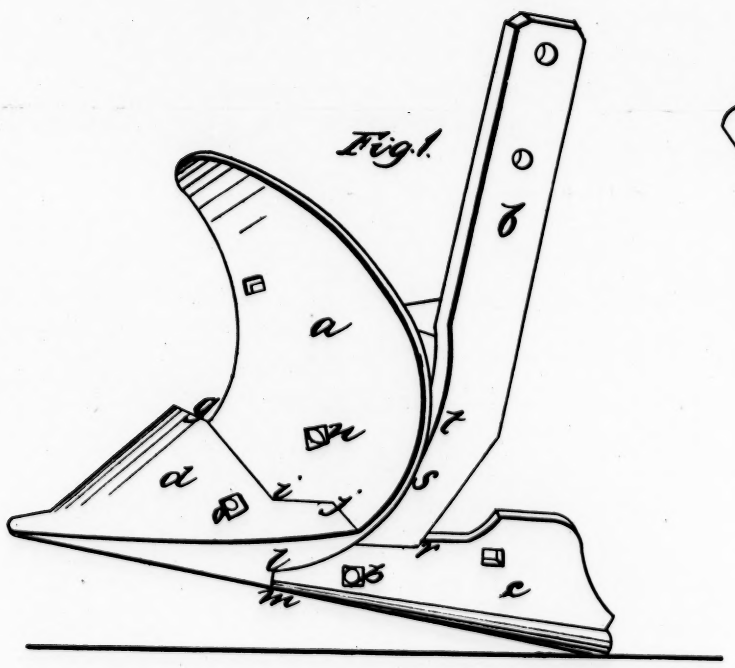

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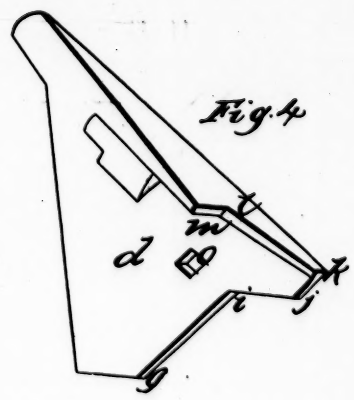

No. 33,
Wm. H. Starke
Starke's Plough

P. H. Starke

Witnesses { P. J. Venning
Geo. T. Hering

Correctly attached
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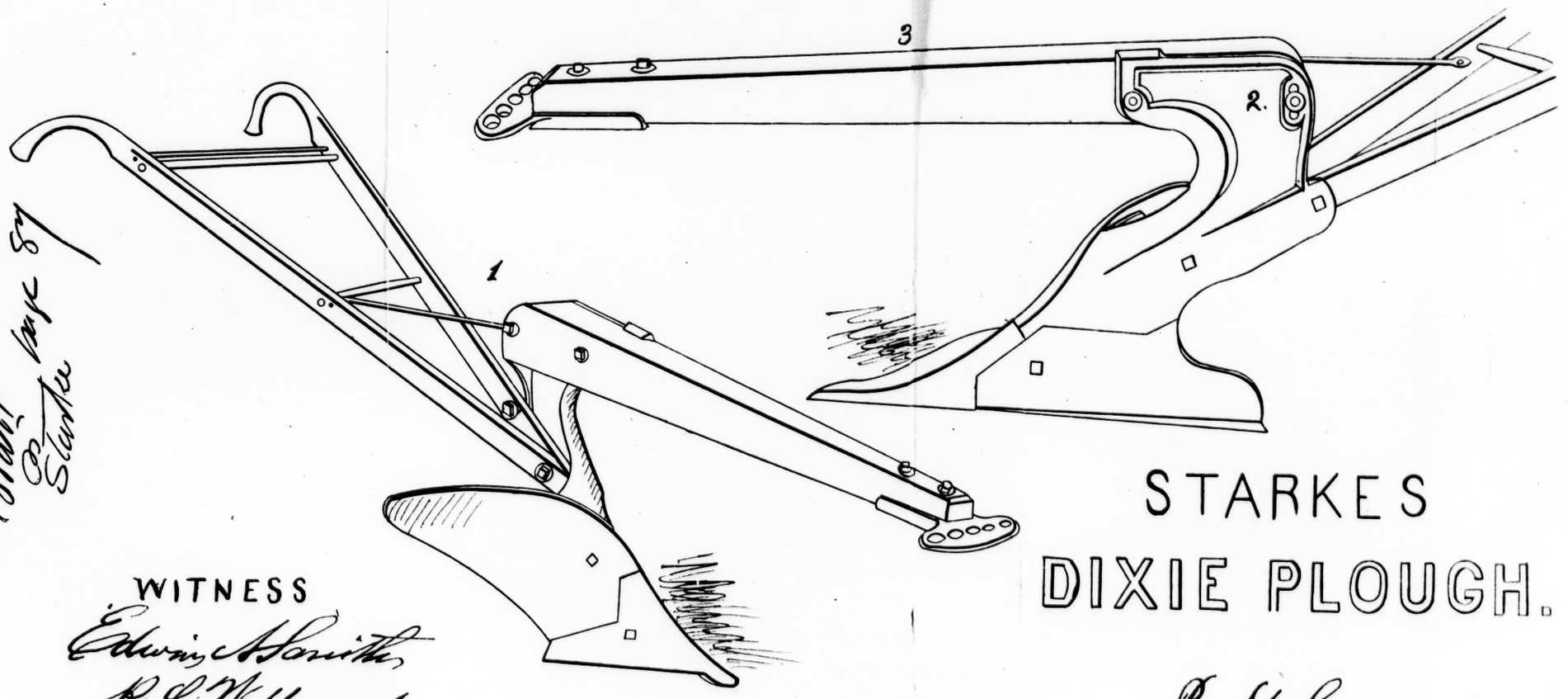

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WITNESS
Edwin A Smith
R. L Williams

STARKES DIXIE PLOUGH.

P. H. Starke
INVENTOR